90-1551

No.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES,
and THEODORE B. GOULD,
*Petitioners,*

v.

BANK OF NEW YORK,
and FRED STANTON SMITH,
*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

May the Bankruptcy Code's statutorily created version of the "mootness doctrine" (11 U.S.C. § 363(m))—which precludes effective appellate review of certain orders in bankruptcy cases unless a stay has been obtained—be extended by analogy to orders to which the statute does not by its terms apply?

If so, may the statute's policy considerations of finality be applied without regard to the policy of preventing manifest injustice and to condone violations of express provisions of the Bankruptcy Code?

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## PETITION FOR A WRIT OF CERTIORARI

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Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould,[1] by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

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[1] Petitioner Miami Center Corporation has no subsidiaries; its parent is petitioner Holywell Corporation, which has no parent corporations or subsidiaries other than wholly owned subsidiaries. No other petitioner is a corporation. *See* S. Ct. R. 29.1.

## OPINIONS OF OTHER COURTS

The opinion of the court of appeals (App. at 1a-2a) is unreported. The opinion of the district court (App. at 3a-9a) is unreported. The bankruptcy court's judgment (App. at 10a-11a) was not supported by an opinion.

## JURISDICTION

The judgment of the court of appeals was entered on January 9, 1991 (App. at 1a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) (1988).

## STATUTORY PROVISIONS INVOLVED

1. Section 363 of the Bankruptcy Code of 1978, as amended, provides in part:

**11 U.S.C. § 363. Use, sale or lease of property**

* * * *

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

* * * *

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203 or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

* * * *

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

* * * *

2. Section 506 of the Bankruptcy Code of 1978, as amended, provides in part:

**11 U.S.C. § 506. Determination of secured status**

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

* * * *

3. Section 158 of the Judicial Code provides in part:

**28 U.S.C. § 158. Appeals**

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. . . .

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

* * * *

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

## STATEMENT

### The Parties and the Chapter 11 Proceedings

This case arises out of chapter 11 bankruptcy proceedings filed voluntarily by each of the petitioners. In the early 1980s, petitioner Miami Center Limited Partnership ("MCLP") developed the Miami Center, a hotel, office and retail complex in Miami, Florida. Petitioners Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Gould were all partners in MCLP, as were numerous investors who were unaffiliated with the debtors. Petitioner Chopin Associates owned the land upon

which the Miami Center was built. Respondent The Bank of New York ("BNY") was the lead construction mortgage lender to MCLP on the Miami Center project. The principal amount loaned by BNY was approximately $196.7 million.[2]

On August 22, 1984, each of the petitioners voluntarily commenced chapter 11 bankruptcy proceedings. As of the date of the filing of the bankruptcy petitions, BNY filed a proof of claim for $218.7 million in principal and interest; BNY reserved its rights to claim interest on its loans for the period following the filing of the petition ("post-petition interest") to the extent it was permitted by law.[3] BNY's security interest in the Miami Center was not the senior lien on the property: it was subordinate to various tax liens, mechanics' liens and encumbrances for ground rent. *See* pp. 24-25 & n.21, *infra.*

**The "Reorganization" Plan**

In February 1985, each of the debtors proposed a plan of reorganization. BNY proposed its own plan, one which its counsel later candidly referred to as a "cramdown" plan of reorganization.[4] The IRS was to be presumably one of the objects of the cramdown; BNY's Plan did not provide for the payment of taxes.[5] The Plan allowed

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[2] *See In re Holywell Corp. (Holywell Corp.* v. *Bank of New York)*, 901 F.2d 931, 931 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 713 (1991).

[3] Section 506 of the Bankruptcy Code permits a secured creditor to recover (from the secured property) interest and other expenses that accrue after the filing of a bankruptcy petition only "to the extent" that the value of the property securing the claim exceeds the claim itself plus administrative expenses necessary to preserve the secured property. *See* pp. 24-25, *infra.*

[4] *See* F. Carter, "Orchestrating and Implementing a Successful Creditors' Plan," *The Bankruptcy Strategist* 3-4 (February 1987).

[5] *See In re Holywell Corp. (Smith* v. *United States)*, 911 F.2d 1539, 1542 (11th Cir. 1990), *petitions for cert. filed*, Nos. 90-1361 (*sub nom. Holywell Corp.* v. *Smith*) (filed February 28, 1991), 90-1484 (*sub nom. United States* v. *Smith*) (filed March 20, 1991).

BNY to recover 100 cents on the dollar and also to recover 100 cents on the dollar for both prepetition and postpetition interest. Amended Consolidated Plan of Reorganization Proposed by the Bank of New York § IV(a) (filed March 26, 1985) (Bankr. C.P. No. 479).

The Plan called for a "modified form" of substantive consolidation of the debtors' estates, requiring the payment of Holywell's liabilities prior to the use of its assets to pay claims against other debtors,[6] and the establishment of a so-called "liquidating trust." 85 Bankr. at 900. The properties transferred to the trust consisted of all the debtors' assets as defined in 11 U.S.C. § 541(a) (Supp. II 1984), and the trustee was vested with title to and control over all of that property. 85 Bankr. at 900. The court appointed Respondent Fred Stanton Smith as trustee under the terms of the Plan.[7]

The Plan's central feature was the trustee's sale of the Miami Center and other properties to BNY's designee for a price of $255.6 million. *See Miami Center Limited Partnership* v. *Bank of New York*, 838 F.2d at 1549 (hereinafter "*Miami Center*").

BNY's Plan contained a number of glaring omissions. Most astonishingly, it did not provide for the payment

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[6] Order on Substantive Consolidation (Bankr. S.D. Fla. July 23, 1985) (Bankr. C.P. No. 840); Transcript of Decision from the Bench on Substantive Consolidation (Bankr. S.D. Fla. July 18, 1985) at 96-97 (Bankr. C.P. No. 829).

[7] In order to ensure implementation of the Plan, the trustee was provided with a full panoply of powers over the debtors' properties, including, among other things, the authority to "[d]eal with the Trust Property or any part or parts thereof in all ways as would be lawful for any person owning the same to deal therewith . . . ." *See In re Holywell Corp. (Smith* v. *United States)*, 911 F.2d at 1542 n.2; *see also* Appendix to Petition for a Writ of Certiorari ("Pet. No. 90-1361 App.") in *Holywell Corp.* v. *Smith*, No. 90-1361, at 42a-46a (setting out portions of the Plan).

of federal income taxes.[8] Whether the trustee had, as a matter of law, to pay such taxes was the subject of a subsequent adversary proceeding (the "tax case"). In the tax case, the courts below concluded that the trustee was not obligated to pay the federal taxes on the liquidation process. The debtors and the Solicitor General have now brought that unprecedented conclusion before this Court on Petitions for Writs of Certiorari (Nos. 90-1361 (filed February 28, 1991); 90-1484 (filed March 20, 1991)). To this day, the federal taxes remain unpaid.

In addition, although the bankruptcy court (in its memorandum order confirming the Plan dated August 8, 1985) had described BNY's claim as "undersecured and hopelessly in default," App. at 12a; 54 Bankr. at 42, the Plan provided for the payment of postpetition interest to BNY. As we explain below, an undersecured creditor is not entitled to carve postpetition interest out of the property held as security. *See* pp. 24-25 & n.21,

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[8] *See In re Holywell Corp. (Smith* v. *United States)*, 911 F.2d at 1542. The tax liabilities in question arise primarily from two sources: (1) the trust's post-confirmation earnings over the last five years, consisting of interest and other taxable items, which now total more than $19.7 million; and (2) the taxable gain realized when the trustee sold the Miami Center. MCLP had a number of investor limited partners who were, of course, not themselves in bankruptcy. MCLP continued to file information returns as a partnership, and its returns were the subject of an audit by the Internal Revenue Service. According to the Service's final report on its examination of MCLP (dated September 6, 1989), the trustee's sale of the Miami Center resulted in a net taxable gain attributable to the partnership interests of Holywell and MCC of approximately $58.7 million and a net ordinary loss attributable to the partnership interests of Holywell and MCC of approximately $19.9 million; the sale also resulted in a net taxable gain attributable to Gould's partnership interest of approximately $18.98 million and a net ordinary loss attributable to Gould's partnership interest of approximately $6.4 million. *See* the Petition in No. 90-1361 at 6 n.5. In addition, the Service is currently conducting an audit of Holywell Corporation to determine the amount of tax liabilities arising from these bankruptcy proceedings.

*infra*. Notwithstanding the silence as to responsibility for taxes and the glaring violation of the Bankruptcy Code as to payment of postpetition interest, the Plan was confirmed, over the debtors' objections, by the bankruptcy court in an order dated August 8, 1985.[9]

**Proceedings on Appeal of the Confirmation Order**

The bankruptcy court's memorandum opinion rejected most of the debtors' objections without discussion. App. at 12a-16a; 54 Bankr. at 41-43. The debtors appealed the confirmation of the Plan to the district court. They were unable to post the $140 million supersedeas bond set by the bankruptcy court, and therefore no stay was entered. *See* App. at 4a.

On October 10, 1985, the Plan was consummated while appeal of the confirmation order was pending in the district court. The debtors did not participate in and were not represented at the October 10, 1985, closing of the sale of the Miami Center to BNY's designee—a trust controlled by BNY and the creditors' committees. BNY drafted the closing statement. At the closing, a number of "closing adjustments" were made to the purchase price, the most significant of which was a credit to BNY of more than $27 million representing postpetition interest.

On appeal of the confirmation order, the district court rejected BNY's argument that the debtors' appeal was moot (although the Plan had in fact by then been consummated by the trustee's sale of the Miami Center to an entity controlled by BNY and its co-lenders on the Miami Center project) and remanded the case so that the bankruptcy court could enter additional findings of

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[9] App. at 12a-16a; *In re Holywell Corp.*, 54 Bankr. 41, 42-43, *aff'd*, 59 Bankr. 340 (S.D. Fla. 1986), *appeal dismissed sub nom. Miami Center Ltd. Partnership* v. *Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

fact and conclusions of law. *See* 59 Bankr. at 344. On January 29, 1986, on remand, the bankruptcy court adopted verbatim a set of "findings" proposed by BNY. *See Miami Center*, 838 F.2d at 1551 n.4. Those findings do not contain any discussion about the extent and value of BNY's security interest in the Miami Center properties.[10]

Earlier, in January 1986, shortly before the bankruptcy court adopted BNY's "findings," the district court heard argument on an "emergency motion" by BNY concerning the validity of its title to the Miami Center. BNY's counsel (Mr. Salter) and the district judge discussed the bankruptcy court's finding in the August 8, 1985, confirmation order that BNY was "undersecured," and Mr. Salter explained why BNY was in fact undersecured. The district judge asked Mr. Salter, concerning the appraised value of the property and the value of BNY's cash collateral, "have you taken all that into account when you . . . say the Bank is undersecured?"

"Yes, sir," answered Mr. Salter, "Yes, indeed." He then went on to explain that BNY's collateral was subordinate to various superior encumbrances, including "the amount of the unpaid taxes." Transcript of Oral Ar-

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[10] Findings of Fact and Conclusions of Law Upon Remand (Proposed by BNY January 23, 1986; adopted *in toto* January 29, 1986) (Bankr. C.P. Nos. 1176, 1188). The findings do refer to an earlier judgment by that court that BNY held a *lien* in the amount of $234.3 million plus interest from March 15, 1985 (*id.* ¶ 18), but that judgment in no way purported to evaluate the extent and value of BNY's security interest, which could not have been determined until all liens superior to that of BNY under applicable non-bankruptcy law were accounted for and the value of the Miami Center itself had been established. *See* pp. 24-25, *infra*. Obviously, the fair market value of the Miami Center could not have been established until consummation of the sale; and even then it was necessary to use an appraisal, because the sale under the Plan was not at arms' length but was to the nominee of BNY, the principal secured creditor. *Id.*

gument, Case No. 85-3225 (S.D. Fla. January 10, 1986); *see* App. at 6a.

Following the bankruptcy court's entry of further findings and conclusions relating to the confirmation of the Plan, the district court affirmed the bankruptcy court's confirmation order on the merits. 59 Bankr. 340. On further appeal of the confirmation order, the Eleventh Circuit held that the case was moot and vacated the district court's judgment. *Miami Center*, 838 F.2d at 1558.[11] The court of appeals did not hold that the case was moot because there was no longer a case or controversy in the constitutional sense. Neither did it hold that the case was moot because of the Bankruptcy Code's statutory preclusion of appellate review of certain orders in the absence of a stay. Indeed, the court of appeals acknowledged that that statute, 11 U.S.C. § 363(m), was inapplicable to this case. 838 F.2d at 1553.

Instead, the court of appeals' decision not to review the confirmation order rested on a sort of "common law" or judge-made expansion of the statutory preclusion. The court of appeals held that "considerations of finality, protection of the integrity of the foreclosure sale process, and the court's inability to rescind the sale" precluded review. 838 F.2d at 1553 (quoting *In re Matos*, 790 F.2d 864, 865-66 (11th Cir. 1986)).

The court distinguished an earlier case in which it had remanded for a determination of "whether the bankrupt estate was entitled to [the] excess, if any, of the foreclosure bid over the debt." 838 F.2d at 1553 (discussing *Markstein* v. *Massey Assocs.*, 763 F.2d 1325

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[11] Actually, the Eleventh Circuit first held that the *appeal to it* of the confirmation order should be dismissed as moot. 820 F.2d 376 (11th Cir. 1987). Then, on rehearing, the Eleventh Circuit adhered to its earlier mootness ruling but corrected a factual misstatement in its original opinion. 826 F.2d 1010 (11th Cir. 1987). Finally, on a second petition for rehearing, the Eleventh Circuit held that the appeals to it *and* to the district court should be dismissed as moot.

(11th Cir. 1985)). The court noted that the case before it turned on its "lack of power" to "rescind [a] sale where there has been no stay," not on whether adjustments should be made to the purchase price, as in the *Markstein* case. 838 F.2d at 1553.[12] In holding itself powerless to deal with the matter before it, the court stressed that reversing the confirmation order would deny BNY the benefit of its "bargain" and would "strike at the sale to the bank and the reorganization plan as a whole." 838 F.2d at 1556. This Court denied certiorari. As is often the situation in bankruptcy cases, a number of "adversary proceedings" continued, or were later instituted, in the bankruptcy court.[13]

**This Proceeding**

The liquidating trustee—concerned that BNY had taken the $27 million credit for postpetition interest despite the bankruptcy court's statement in its August 8, 1985, confirmation order that BNY was undersecured—commenced an adversary proceeding against BNY and the debtors on October 28, 1987, to resolve whether BNY was oversecured or undersecured (the "postpetition interest case"). At the time the trustee brought the ad-

[12] Oddly enough, in its earlier, first opinion on rehearing, the court, in correcting its opinion by stating that neither of the lower courts found that the project was sold to a "good faith" purchaser, had observed that this "does not affect our conclusion because debtors do not challenge the sale of the project or seek reconveyance of the project." 826 F.2d 1010.

[13] Adversary proceedings are conducted by the bankruptcy court to resolve certain kinds of contested issues arising during the course of the bankruptcy case. For example, a case removed to bankruptcy court pursuant to 28 U.S.C. § 1452 is an adversary proceeding, as is a proceeding to determine an interest in property. *See* Bankr. R. 7001. Because adversary proceedings may continue beyond the confirmation of a reorganization plan, they must often be appealed separately. The Plan of Reorganization provided for the retention of jurisdiction by the bankruptcy court. Pet. No. 90-1361 App. at 46a.

versary proceeding, the Eleventh Circuit had already held that the appeal of the confirmation order should be dismissed as moot, 820 F.2d 376 (entered June 29, 1987), and had adhered to that determination on rehearing. 826 F.2d 1010 (entered September 8, 1987). The trustee was not challenging the confirmation of the Plan or the sale of the property; he was focussing on the taking of the credit for $27 million in postpetition interest by BNY. The trustee sought a resolution of the issue whether BNY was undersecured, and explained in his complaint that he and BNY took the position that BNY was entitled to receive the $27 million credit against the purchase price for postpetition interest. Adversary Complaint (filed October 28, 1987) ¶ 13. The case was thus an express attempt by the trustee to obtain a judicial resolution of several disputes over "post-closing adjustments required under the Contract" including the $27 million credit, *id.* ¶¶ 9, 12, and was not affected by the court of appeals' determination that the sale itself could not be challenged.

The complaint alleged that the bankruptcy court's statement on August 8, 1985, as part of its order confirming the Plan, that BNY was undersecured (App. at 12a; 54 Bankr. at 42) "does not refer to a finding of fact or evidence in the record as support for that conclusion." Adversary Complaint ¶ 16. Indeed, the Adversary Complaint omitted to state that the later findings of fact and conclusions of law entered on remand from the district court were written by BNY, and that they contained no conclusions, findings or analysis as to whether BNY's claim was oversecured or undersecured.[14]

The bankruptcy court did not see fit to make any findings of fact in response to the trustee's desire to have the issue of oversecurity or undersecurity resolved in this

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[14] As we demonstrate below, *see* pp. 24-27, *infra*, there is no question that BNY's claim was, in fact, undersecured.

adversary proceeding. Instead, its findings of fact and conclusions of law consisted of a lone, unsupported statement completely contradictory of its earlier ruling of August 8, 1985: "The Bank was not an undersecured creditor in these reorganization proceedings." App. at 11a.

The debtors appealed. On appeal, the district court expressed considerable scepticism about the underlying legality of BNY's having taken a credit for postpetition interest at the closing of the sale of the Miami Center. The district court focused particularly on concessions by BNY's counsel and the trustee's counsel [15] that BNY was undersecured. App. at 6a-7a. As the district court observed, BNY's counsel, Mr. Salter, expressly acknowledged to the district court on January 10, 1986, that he had taken "all relevant factors into account" in concluding that BNY was undersecured. *Id.*

Notwithstanding the district court's concern that BNY unlawfully took a closing adjustment of $27 million—money that could have otherwise been used to satisfy federal tax obligations—the district court felt bound by the confirmation order. The district court therefore held that, applying 11 U.S.C. § 363(m) by analogy, not only the validity of the sale of the Miami Center, but the relative claims of the principal secured creditor and other claimants to the proceeds of its sale, had become untouchable. The district court concluded:

> Whether or not BONY was "entitled" to obtain the credit for post-petition interest, the credit is now lawful in the sense that it is an integral component of the confirmed Plan. . . .

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[15] The evidence was that the trustee had obtained indemnification from BNY because the Plan failed to provide for the payment of federal income taxes and because of the conflict between the bankruptcy court's August 8, 1985, finding of undersecurity and the $27 million credit. *See* App. at 7a.

> Although the credit itself is not subject to collateral attack at this late date, the validity of the credit under Section 506(b) as a matter of law must remain unanswered.

App. at 8a. The district court therefore remanded the postpetition interest case with instructions that the bankruptcy court's order be vacated. App. at 9a.

The debtors appealed. The court of appeals disposed of five separate appeals by the debtors on the same day in a series of summary, *per curiam* opinions; it held that this case was controlled by its earlier decision on the appeal of the confirmation order in *Miami Center*, 838 F.2d 1544. It did not allude to its prior discussion in that decision of the *Markstein* case (*see* pp. 10-11, *supra*), which held that issues of closing adjustments to the distribution of the purchase price were not mooted by the consummation of a sale. Neither did the court of appeals focus on the fact that its decision holding the appeal of the confirmation order to be moot was premised on the position that the sale of the Miami Center itself could not be set aside, nor on the fact that the present case related only to the closing adjustments.

All that the court of appeals said was that the $27 million credit "was part of the now substantially consummated plan of reorganization, and appellants' challenge thus is moot." App. at 2a. It went on to characterize the five appeals (without discussion or differentiation among them) as "wholly lacking in merit" and "frivolous." *Id.*

## REASONS FOR GRANTING THE WRIT

This case raises important issues under the bankruptcy laws, over which the courts of appeals have reached conflicting results. The court of appeals' ruling in this case insulates from judicial review an admittedly unlawful distribution of the proceeds from the sale of an insolvent debtor's property. It does so without direction from the Constitution or Congress that review may not be had; instead, the court of appeals' decision was based solely on "considerations of finality" that amount to a refusal to correct a manifest injustice based on nothing more than judicial fiat.

No argument is made that this case fits within the traditional mootness framework: the controversy between the parties had not been settled or otherwise "mooted" in the usual sense, so as to make further adjudication offend the Article III requirement that the federal courts decide only "Cases" and "Controversies." *See DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). The "usual rule in federal cases . . . that an actual controversy must exist at stages of appellate or certiorari review," *Roe* v. *Wade*, 410 U.S. 113, 125 (1973), is fully met here, and no one could argue otherwise.

Nor is there any argument that Congress by statute has expressly precluded the district courts or the courts of appeals from exercising jurisdiction or providing relief in this case. *Cf. Lockerty* v. *Phillips*, 319 U.S. 182, 187-89 (1943); *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 512-14 (1869). The only arguably relevant statute, 11 U.S.C. § 363(m), prohibits effective appellate review of certain orders where a stay has not been obtained. Section 363(m), however, is, on its face, inapplicable. *See* p. 18, *infra*.

The decision thus raises two separate, important issues affecting the administration of the bankruptcy laws.

First, it improperly extends the limited statutory preclusion of appellate review in bankruptcy cases, thereby insulating from all judicial review cases that Congress intended to be subject to review. *See* pp. 17-20, *infra*. Second, if the statute may be extended by analogy, its policy favoring finality may not be extended without regard to the courts' duty to prevent injustice. The decision did not weigh (or even discuss) policies embodied in section 503(b)(1)(B)(i) of the Bankruptcy Code itself and in other statutes expressing Congress' unmistakable intent that federal taxes on the liquidation process be paid. By applying only the "policies" embodied in section 363(m)—and those beyond the letter and intent of that section—the court of appeals has eviscerated the ability to obtain funds to pay federal income taxes, thereby allowing a manifest injustice to be perpetrated. *See* pp. 20-24, 27-29, *infra*.

The court of appeals reached this result as the last step in a procedural history that must cause concern as to the proper administration of justice. When the confirmation order first came before the court of appeals for appellate review, the only finding of record as to whether BNY was in fact undersecured was the bankruptcy court's August 8, 1985, finding that BNY was undersecured. This finding was in accordance with statements later made by counsel for BNY before the district court that BNY was undersecured. The court of appeals never reached the merits of the confirmation order but instead held that the appeal to it (or, in the final version of its opinion, to the district court) was moot. This was because the sale had by then been consummated, since the debtors could not put up a multimillion dollar bond in order to stay the confirmation order.

After confirmation (and after dismissal by the court of appeals of the debtors' appeal of the confirmation order), proceedings were held in the bankruptcy court at the instance of the trustee to determine whether the $27

million credit was appropriate. The bankruptcy court, without a word of explanation as to its change of position, and without any findings or analysis, concluded that BNY was not undersecured. The district court, expressing extreme scepticism as to this conclusion, particularly in the light of representations previously made to it in open court by BNY's counsel, nonetheless in effect upheld the bankruptcy court's decision by applying the "mootness" doctrine by vacating the bankruptcy court's order as moot. The court of appeals then reached the same result by directing that the appeal to it from the district court be dismissed as moot.

Throughout this bizarre procedural history, there has never been any determination by any Article III judge on the merits that the taking of the $27 million credit was appropriate, and the only decision to that effect, the bankruptcy court's order of December 18, 1987—inexplicably contradicting its prior order and not supported by findings or analysis—has been vacated by an Article III court. Nonetheless, BNY has received, and retains, the $27 million credit, the taking of which is contrary to the statutes.[16]

## I. SECTION 363(m) MAY NOT BE EXPANDED BY THE COURTS.

Congress has determined that "[t]he courts of appeals shall have jurisdiction of appeals from *all* final decisions, judgments, orders, and decrees" entered in bankruptcy

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[16] This Court's precedents going back over a century make it clear that the courts are not to implement a contract that is void in law. *See, e.g., Bank of United States* v. *Owens*, 27 U.S. (2 Pet.) 527, 538-39 (1829). *See also United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961) ("a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment"). This principle would apply even more strongly to a plan confirmed over objection than to a binding contract signed by all parties.

cases. 28 U.S.C. § 158(d) (emphasis added). Section 158 also uses mandatory language in describing the appellate jurisdiction of the district courts and of bankruptcy appellate panels over orders of the bankruptcy courts. 28 U.S.C. §§ 158(a), 158(b).

Thus Congress has established a system that requires: (1) exclusive district court jurisdiction of bankruptcy cases, which are ordinarily referred to the bankruptcy court;[17] (2) appellate review in the first instance either by a district judge or a bankruptcy appellate panel; and (3) thereafter appellate review of *all* cases in the courts of appeals. The mandatory language of the statute ("shall have jurisdiction" over "all" appeals) indicates a clear intent that judicial review should not be precluded except in the most limited circumstances—circumstances that Congress has defined by statute.

There are only two provisions in the Bankruptcy Code precluding appellate review in the absence of a stay: section 363(m) and section 364(e).[18] Under section 363(m), a sale like the one here would be insulated from appellate review only if it were made by a trustee (or the debtor-in-possession) after notice and a public hearing on the proposed sale during the course of the bankruptcy case and under the auspices of section 363(b). The closing adjustments at issue here were not subject to the notice and hearing process contemplated in section 363: once the Plan was confirmed, the "liquidating trustee" had complete control over the debtor's property and had no need for (and indeed did not seek) the court's advance approval of the various adjustments taken upon the consummation of the sale. (He did, however, receive an indemnity from BNY because of his concern that some such

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[17] 28 U.S.C. §§ 157(a), 1334.

[18] Section 364(e)—which relates to authorizations under section 364 to obtain credit or incur debt—is clearly inapplicable to this case even by any form of analogy.

adjustments were unlawful, App. at 7a.) Therefore the purchaser of the Miami Center (which was controlled by BNY and the other lenders on the construction mortgages), could not have relied on the cloud-lifting effect normally understood to accompany a court-supervised sale when they took the closing adjustments. Indeed, BNY and the court of appeals have both acknowledged that "[s]ection 363(m) does not apply to sales by a liquidating trustee pursuant to a plan of liquidation." *Miami Center*, 838 F.2d at 1553. In this absence of congressional direction to the contrary, judicial review should not be precluded based on generalized policy considerations of finality.

Although some judges and courts have expressed the view that precluding review in cases where sections 363(m) and 364(e) do not apply will enhance the value of bankruptcy estates being liquidated,[19] Congress made its view clear that only a limited class of bankruptcy transactions was to be insulated from appellate review. That policy decision must be left with Congress.

Absent exceptional circumstances, "the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983) (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976)); *see England* v. *Louisiana State Bd. of Medical Examiners*, 376 U.S. 411, 415 (1964); *McClellan* v. *Carland*, 217 U.S. 268, 282 (1910); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1824). As Justice Brennan explained in *Colorado River*, "only the clearest of justifications" warrant a federal court's decision to decline to exercise the jurisdiction provided by Congress. 424 U.S. at 819. Such justifications include,

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[19] *See, e.g., In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1095 (3d Cir. 1990) (Sloviter, J., dissenting); *In re Stadium Mgt. Corp.*, 895 F.2d 845, 847 (1st Cir. 1990).

for example, a clear expression of Congressional intent that jurisdiction should not be exercised—as in *Colorado River* itself, as well as cases controlled by the language of statutes that preclude judicial review. *E.g.*, *Lockerty* v. *Phillips*, 319 U.S. at 187-89; *Ex Parte McCardle*, 74 U.S. (7 Wall.) at 512-14.[20] Here, however, Congress has expressed its intent that the courts shall exercise jurisdiction over "all" bankruptcy cases, 28 U.S.C. §§ 158(d), 1334, and carved out only two limited exceptions.

One court of appeals has recently declined to follow the Eleventh Circuit's decision to extend the "principles of finality" embodied in sections 363(m) and 364(e) to transactions that do not come within their express ambit. *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1084 (3d Cir. 1990). In fact, the dissent in that case relied expressly on the reasoning and language of the Eleventh Circuit's decision on appeal of the confirmation order in *Miami Center*, 838 F.2d at 1553—the same opinion that the Eleventh Circuit held controlling in this case. Nevertheless, the majority in *Joshua Slocum Ltd.* rejected the dissent's argument that the court should fashion a "judicial doctrine" based on "the particular need for finality in orders regarding stays in bankruptcy." 922 F.2d at 1095. Noting that "only two provisions of the Bankruptcy Code . . . specifically require that a party seek a stay pending appeal," the majority declined to "create a third situation where parties are required to seek a stay . . . ." 922 F.2d at 1084.

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[20] Similarly, "considerations of proper constitutional adjudication and regard for federal-state relations" require the federal courts to abstain from deciding some cases (*Colorado River*, 424 U.S. at 817), although none of the abstention doctrines is implicated by this case.

## II. EVEN IF SECTION 363(m) MAY BE EXTENDED BY ANALOGY, THE DECISION BELOW IGNORES FACTORS THAT HAVE DISSUADED OTHER COURTS FROM CONSIDERING SUCH AN EXTENSION.

The extension of the "mootness" doctrine beyond its statutory parameters in the Bankruptcy Code involves a manifest inequity that should lead this Court to be sparing in sanctioning its extension. The doctrine means that only those who can pay can obtain appellate review. The condition on being permitted an appeal is the obtaining of a supersedeas bond to halt the effectiveness of the judgment appealed from, and thus to prevent the consummation of the action permitted by the order appealed from. *See* Bankr. R. 8005. Supersedeas bonds cost money, and if the party applying for a bond is not creditworthy, the bond will have to be fully collateralized by the applicant with the surety company. Surety companies are not charitable organizations and they are not running a legal aid society. By definition, as a class, debtors in bankruptcy cases are apt to be corporations or individuals that are not creditworthy. That is why they are debtors in bankruptcy cases. The decision of the court of appeals here added to those provided by Congress an additional class of cases where judicial review is available only to those who have sufficient funds to put up a large supersedeas bond. It is no surprise that, having been stripped of their assets, the debtors could not post the $140 million bond set by the bankruptcy court, or even the $50 million set by the district court. *See* App. at 4a.

To apply such a doctrine beyond the narrow scope in which Congress here expressly provided for it—specific cases where the interests of third-party purchasers are apt to be put at risk—raises such fundamental questions that this Court's attention is warranted. This is not a case of a sale of the debtor's property pursuant to an unstayed order, where the third party may lose the bene-

fit of his bargain and what he has bought and paid for if appellate review is permitted despite the consummation of the sale. Rather, the liquidating trustee's adversary complaint related to the application of the proceeds of a sale by the liquidating trustee himself of the debtors' major asset, not to a third party, but for all intents and purposes to the Plan's proponent. And here there is no attempt to set aside the sale, but simply to deal with the proceeds in a way consistent with the law.

Furthermore, by making the bond upon appeal of the confirmation order a prerequisite of any subsequent judicial review, the court of appeals has allowed a manifest injustice to go uncorrected: an undersecured creditor has enriched itself at the expense of the public fisc and without fear of judicial review. It has taken credit for $27 million that otherwise would have gone to the liquidating trust, and—if our and the Solicitor General's Petitions in Nos. 90-1361 and 90-1484 are well founded—would have been available to pay capital gains and other income taxes. This, too, is an important issue in the administration of bankruptcy cases. This Court has recognized that a judgment may be reexamined years after it has been entered "whenever such action is appropriate to accomplish justice." *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *Klapprott* v. *United States*, 335 U.S. 601, 614-15 (1949)). Surely if a court must consider the interests of justice in determining whether to *reopen* a judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure, such considerations must also be taken into account in determining whether to apply a common law rule precluding appellate review of a judgment in the ordinary course.

Other courts of appeals have in fact taken such considerations into account when applying the "mootness" doctrine. For example, the District of Columbia Circuit concluded that an appeal to it was not moot, inasmuch as all the necessary parties were before the court and the

court was able to fashion effective relief. The D.C. Circuit applied a standard articulated by the Ninth Circuit: is the court faced with a situation where the plan "has been so far implemented that *'it is impossible to fashion effective relief for all concerned?'*" *In re AOV Indus.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986) (quoting *In re Roberts Farms*, 652 F.2d 793, 797 (9th Cir. 1981)) (emphasis by the *AOV* court). In the D.C. Circuit's view, the dispositive issues are whether the trustee remains subject to the control of the plan and whether the other parties necessary for effective relief remain subject to the power of the court: "[w]hile much of the debtor's property has been liquidated, and many of the creditors have been paid, the plan still controls the actions of the trustee." 792 F.2d at 1148 (quoting *In re Combined Metals Reduction Co.*, 557 F.2d 179, 194-95 (9th Cir. 1977)).

Here, all parties continue to be before the court: nothing prevents the court from ordering disgorgement, restitution or other equitable relief. In one aspect of the appeal in the D.C. Circuit, for example, the debtors challenged the behavior of a law firm representing the proponent of the plan of reorganization. "Were this court to rule favorably on [the] conflict of interest allegations," the D.C. Circuit held, "one possible remedy would be to order the law firm to make partial or total restitution of these payments to the Debtor's estate for redistribution to the creditors." *In re AOV Indus.*, 792 F.2d at 1149. Similarly, the Sixth Circuit has recognized the inapplicability of former Bankruptcy Rule 805 (the predecessor to 11 U.S.C. §§ 363(m) and 364(e)) where an appellant was seeking disgorgement of money taken from it pursuant to an unlawful court order. *Ohio* v. *Madeline Marie Nursing Homes*, 694 F.2d 449, 463 (6th Cir. 1982).

In short, the Third Circuit, declining to follow the holding of the Eleventh Circuit, has refused to expand the so-called "mootness doctrine" in the absence of congres-

sional direction to do so. Other Circuits, including the D.C. Circuit, the Ninth Circuit and the Sixth Circuit, have applied the "mootness doctrine" on a case-by-case basis taking into account the interests of justice. The Eleventh Circuit, however, has held the "mootness doctrine" to be a flat preclusion of any sort of judicial review following substantial consummation of a reorganization plan. This Court should resolve that conflict, and, in doing so, reaffirm the duty of the district courts and courts of appeals to hear appeals in bankruptcy cases unless *Congress* has decided that no such appeals may be had.

## III. THAT BNY'S CLAIM WAS UNDERSECURED CANNOT NOW BE DENIED.

On August 8, 1985, when it confirmed the Plan, the bankruptcy court stated in its confirmation order that BNY's claim was "undersecured." 54 Bankr. at 42.

When, in January 1986, the district judge who later was to hear the appeal of the present adversary proceeding questioned BNY's counsel about this statement by the bankruptcy court, counsel confirmed that "[y]es, indeed," BNY was undersecured—and explained why that was true. *See* pp. 9-10, *supra*; App. at 6a. That admission in open court was, without question, correct, and we set out the reasons why that is true only so that issues about whether BNY was undersecured are not speciously raised to cloud the issues on which certiorari should be granted.

In *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 372-73 (1988), this Court explained the "substantive effect" of section 506 of the Bankruptcy Code—that an undersecured creditor may not recover postpetition interest from the secured property, and that an oversecured creditor may recover postpetition interest only "to the extent" that the value of the property securing a claim exceeds the claim itself plus the administrative costs of preserving the property.

In the briefs to the court of appeals in this case, the debtors demonstrated that BNY was undersecured: its security interest in the Miami Center property was less than its total claim for principal and interest including postpetition interest.[21] BNY did not dispute these figures. Instead, it contended that it had an additional $30 million worth of cash collateral that it took under the terms of the bankruptcy court's December 31, 1984, Cash Collateral Order (App. at 17a-20), leaving it with a security cushion of more than the $27 million credit it took for postpetition interest.

BNY's claim that it had a security interest in the debtors' cash and stock in Holywell's subsidiaries derives from the debtors' subsidiaries' sales of properties other than the Miami Center (known as the "Washington Properties") in 1984, during the early months of the bankruptcy proceedings. *See* App. at 17a-18a. In grant-

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[21] The bankruptcy court determined that BNY's lien totalled more than $234 million, of which approximately $218 million represented principal and prepetition interest. (Bankr. C.P. No. 21 in Adv. Pro. 85-160). The extent to which that lien was *secured*, however, was subject to two sources of limitation: the "value of the interest of the estate in the collateral"; and the "value of the interest of the creditor in such interest of the estate." 3 L. King, R. Babitt, A. Herzog & R. Levin, *Collier on Bankruptcy*, ¶ 506.04 at 506-16 (15th ed. 1990).

The value of certain leased equipment (approximately $13.5 million) in which the estate did not have an ownership interest should have been subtracted from the $255.6 million in proceeds from the sale of the Miami Center, leaving only about $242.1 as the amount of "the estate's interest" in the Miami Center. *See Collier on Bankruptcy, supra*, at 506-17 to 506-18. BNY's lien on the Miami Center was also subordinate to mechanics' liens, real estate tax liens and rental encumbrances totalling approximately $21.5 million. *See Collier on Bankruptcy, supra* at 506-19. BNY's liens, filed upon form UCC-1, acknowledged these superior encumbrances. BNY's security interest in the Miami Center properties therefore totalled approximately $220.6 million. Its lien of more than $234 million could not possibly have been completely secured by the Miami Center. *See* Appellants' Initial Brief at 30 (filed January 13, 1989).

ing BNY's emergency request that the proceeds of those sales be treated as cash collateral under 11 U.S.C. § 363 (a), the bankruptcy court expressly recognized that federal income taxes had not yet been determined or paid on the gain realized on the sales of the Washington properties, let alone on the debtors' other income, and that no source of income existed to pay those tax liabilities other than the proceeds of sales of the debtors' properties themselves. App. at 18a-19a. Thus, the bankruptcy court ruled that "BNY appears to have a first lien on the interests of Holywell and Gould in the *net* proceeds from the sale of the Washington Properties . . . ." App. at 18a (emphasis added). In light of the unpaid liabilities to the Internal Revenue Service acknowledged in the bankruptcy court's order, the reference to "*net* proceeds" could only have been a reference to after-tax proceeds.

As *Collier* explains, "a security agreement may contain a limitation on the amount of the indebtedness that may be secured by the debtor's property." *Collier on Bankruptcy, supra* at 506-19. Here, the Cash Collateral Order anticipated: (1) that the obligations of Holywell and its non-debtor subsidiaries to pay federal taxes would have to be satisfied; and (2) that no source of funds other than the proceeds of sales (the cash collateral itself) would be available to satisfy those obligations. App. at 18a-19a. The bankruptcy court therefore granted BNY a security interest only in the "net proceeds of sale" of the Washington properties, anticipating that the cash collateral would be used to wind up Holywell and its non-debtor subsidiaries and to satisfy "all obligations to the Internal Revenue Service . . . ." App. at 19a.[22] It is

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[22] Before the trustee could wind up the non-debtor subsidiaries and use their cash to pay BNY's claim, therefore, he was under an obligation to pay federal income taxes owed by Holywell and by the non-debtor subsidiaries. *See also Sampsell* v. *Imperial Paper Co.*, 313 U.S. 215, 219 (1941) ("All questions of fraudulent conveyance aside, creditors of the corporation normally would be entitled to

only by sweeping those tax obligations under the carpet—by transferring them to the supposedly reorganized debtors—that BNY can purport to hold any interest in the cash collateral.

Until the taxes are paid, the extent of BNY's security interest in the cash collateral, if any, cannot be known with certainty. However, it is clear that millions of dollars of tax liability have not been paid. *See* p. 7 n.8, *supra*.

## IV. THE COURT OF APPEALS HAS GIVEN ITS IMPRIMATUR TO A MANIFEST INJUSTICE PERPETRATED BY BNY.

By hiding the federal tax liabilities in the liquidation process, BNY has succeeded in recovering every cent of principal and every cent of interest, both pre- and post-petition—indeed, interest at a rate above that provided for in its contract.[23] And by applying a statute precluding review to a situation to which it admittedly does not apply, the court of appeals has given its blessing to this egregious abuse of the bankruptcy process.

In the related case now before the Court on Petitions for Writs of Certiorari (Nos. 90-1361, 90-1484) (the tax case), we and the Solicitor General have argued that the trustee in this case should have filed federal income tax returns and paid federal income taxes because of the commands of a number of statutes requiring him to do so. Those statutes apply universally, and do not depend on the terms of the Plan.

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satisfy their claims out of corporate assets prior to any participation by the creditors of the stockholders."). In addition, since Holywell and its subsidiaries filed their federal income tax returns as part of a consolidated group, each non-debtor subsidiary was severally liable for the entire amount of federal taxes owed by the group. Treas. Reg. § 1.1502-6.

[23] For the mathematical error involved in this, see 901 F.2d at 933. Remarkably, the court of appeals, following its notions about the mootness doctrine, refused to do anything about this substantial mathematical error in the calculation of interest due to BNY. *Id.*

In our Petition in No. 90-1361, we also showed that the court of appeals' decision points the way to a new form of tax avoidance: instead of converting the case to a chapter 7 liquidation or leaving the debtors as debtors-in-possession to liquidate their estates under court supervision and a "liquidating chapter 11" plan, creditors will attempt to "cram down" plans like BNY's Plan in this case, providing for a "liquidating trust." The court of appeals' decision in this case goes one step further in encouraging such behavior. By sweeping under the carpet a substantial administrative expense—the payment of taxes on the capital gains realized upon the sale of the debtors' properties—the Plan speciously appeared to provide for the payment of all claims of unsecured creditors. Had taxes been included there would have been less money available to the unsecured creditors, and BNY's "credit" for the $27 million would likely have been challenged by them. Since the unsecured creditors (who were far more likely to have had the wherewithal to put up a supersedeas bond) were being paid with funds that (if we are correct in the tax case) should have gone for the payment of taxes, they had no cause for complaint and no reason to challenge BNY's behavior.

There is no dispute that if the estate had been liquidated by the debtors-in-possession under court supervision, or by a trustee elected under chapter 7, or even by a trustee appointed during the administration of the case under chapter 11 (rather than by a so-called "liquidating trustee"), the capital gains taxes and other income taxes on income earned by the trustee would have been entitled to first priority as administrative expenses. *See* 11 U.S.C. §§ 507(a)(1), 503(b)(1)(B). By a stroke of the pen, BNY claims to have eliminated that administrative expense priority. And by purporting to immunize the trustee from obligations to pay federal income tax, BNY's Plan permitted the creditors (especially BNY itself) to obtain a windfall without competition from the Government's claim for federal income taxes. The estate, swollen

by the retention of moneys otherwise due the federal government for taxes, yielded itself readily to such payments to the creditors in lieu of those due the public Treasury. To compound this, BNY's unlawful taking and retention of the $27 million credit may well leave the trust with insufficient funds with which to pay its taxes, assuming that the Court agrees with our and the Solicitor General's position in the tax case, Nos. 90-1361 and 90-1484.

The Court need not countenance this manifest injustice merely because of "considerations of finality" not imposed by the Constitution or by any statute. Compelling considerations of justice, in fact, lead to the opposite conclusion.

## CONCLUSION

This petition for a writ of certiorari should be granted.[24]

Respectfully submitted,

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April 1991

[24] In light of our and the Solicitor General's petitions for certiorari in the tax case (Nos. 90-1361 and 90-1484) and the interconnection of this case with those petitions, the Court may wish to hold action on this petition in abeyance pending its decision on the tax case petitions if certiorari is granted as to them.

# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 88-5770

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IN RE HOLYWELL CORPORATION, *et al.*, DEBTORS.

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HOLYWELL CORPORATION, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN [ASSOCIATES], THEODORE B. GOULD,

*Plaintiffs-Appellants,*

v.

BANK OF NEW YORK and FRED STANTON SMITH, as TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST,

*Defendants-Appellees.*

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On Appeal from the United States District Court
for the Southern District of Florida

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(January 9, 1991)

[Judgment Entered January 9, 1991]

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Before: KRAVITCH and ANDERSON, *Circuit Judges*, and LYNNE*, *Senior District Judge*

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* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

This appeal is one of a seemingly unending stream of appeals arising out of the Chapter 11 bankruptcies of several debtors involved in the Miami Center project. The general background of the project is described in our previous opinions and will not be repeated here. *See, e.g., Miami Center Ltd. Partnership* v. *Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S. Ct. 69 (1988).

In this appeal, appellants challenge a $27 million credit received by the Bank of New York toward the purchase price of the project. This credit was part of the now substantially consummated plan of reorganization, and appellants' challenge thus is moot. *See id.* This appeal therefore is DISMISSED.

Appellee Bank of New York has requested that this court assess double costs and reasonable attorneys' fees against appellants and their attorneys for bringing a frivolous appeal. Because this appeal, like several of the others brought by the appellants that we decide today, is wholly lacking in merit, we find this to be a close question. In view of all of the circumstances, however, including the fact that appellants were not put on notice in the courts below that their arguments are frivolous, we decline to assess double costs and reasonable attorneys' fees in this case.

DISMISSED.[1]

---

[1] All pending motions, other than the motion to dismiss, are denied.

**APPENDIX B**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

---

Case No. 88-151-CIV-ARONOVITZ

---

IN RE HOLYWELL CORPORATION, *et al.*, DEBTORS.

---

HOLYWELL CORPORATION, *et al.*,
*Appellants*,
v.
FRED STANTON SMITH and THE BANK OF NEW YORK,
*Appellees.*

---

On Appeal from the United States Bankruptcy Court
for the Southern District of Florida

---

[Filed July 21, 1988]
[Judgment Entered July 21, 1988]

---

FINAL ORDER VACATING DECLARATORY JUDGMENT ON COUNT III OF ADVERSARY COMPLAINT

---

ARONOVITZ, *District Judge*:

*I. Introduction*

Appellants Holywell Corporation, et al. ("Holywell") bring this appeal challenging the bankruptcy court's December 18, 1987 Order finding that appellee, The Bank

of New York ("BONY"), "was not an undersecured creditor," and entering judgment in favor of trustee Fred Stanton Smith ("Smith") on Count III of his adversary complaint. In Count III, Smith sought and received a declaratory judgment that BONY was not undersecured, and that therefore it was "entitled to receive credit against purchase price at closing for post-petition interest." Pursuant to the Amended Consolidated Plan of Reorganization (the "Plan"), BONY obtained a $27,050,115.02 credit towards the purchase price of the Miami Center project which represented interest accrued post-petition.

*II. Procedural History*

Appellants are debtors who had been involved in the development of the Miami Center project, a modern thirty-five story hotel and office building structure located on the bay in downtown Miami. BONY financed the project's construction and was the principal creditor. Debtors filed voluntary petitions for bankruptcy after the mortgage fell into default. After the bankruptcy court confirmed the Plan of reorganization, it required debtors to post a $140 million bond to stay implementation of the Plan during an appeal to the District Court. Debtors appealed this bond requirement to the District Court, which reduced the amount of the bond to $50 million and gave debtors an additional period of time in which to post bond.

Debtors appealed the $50 million bond setting to the Eleventh Circuit, which dismissed debtors' appeal for lack of jurisdiction. Debtors failed to post the $50 million bond, and beginning on October 11, 1985, the trustee and BONY began to implement the Plan. BONY's designee, a land trust, received title to the Miami Center project, its furniture, fixtures and equipment. In exchange, BONY released its judgment lien and $30 million of cash

collateral, and payed about $13.6 million in additional consideration.

Debtors appealed to the District Court both the bankruptcy court's order confirming the Plan and an earlier order consolidating the debtors' estates. The Court concluded that the appeals before it were not moot, but upon BONY's application certified to the Eleventh Circuit the issue of whether debtors' appeal was moot. The Eleventh Circuit declined to accept this certification. The District Court remanded the appeal to the bankruptcy court for further findings of fact and conclusions of law.

The bankruptcy court entered detailed findings and affirmed its previous rulings in all respects. On appeal, the District Court did not revisit the mootness issue, instead ruling on the merits, affirming the bankruptcy court's orders of consolidation and confirmation. Debtors proceeded with an appeal to the Eleventh Circuit, which on June 29, 1987 dismissed the appeal as moot due to the effective consummation of the Plan of reorganization. 820 F.2d 376 (11th Cir. 1987). Debtors petitioned for rehearing, and on September 8, 1987 the Eleventh Circuit concluded on rehearing that it had erred in stating that the Miami Center project was sold to a good faith purchaser. 826 F.2d 1010 (11th Cir. 1987). Nonetheless, the court held that this error did not affect the court's prior holding, and denied the petition in all other respects.

On a further petition for rehearing and suggestion for rehearing en banc, the Eleventh Circuit, on March 10, 1988, rejected its two earlier opinions and concluded for the first time that the *District Court* should have dismissed the appeal to it as moot. 838 F.2d 1547 (11th Cir. 1988). "Arguably the district court should have dismissed the appeal as moot when the case was first before it. But we pretermit discussing this because we hold that the court should have dismissed the appeal as moot when the case came back to it after remand." *Id.* at 1553.

*III. The present dispute*

Trustee Smith initiated this adversary action in the bankruptcy court due to his concern over a statement in the bankruptcy court's original confirmation order dated August 8, 1985: "The Bank of New York, the major creditor, whose claim is undersecured . . . ." Smith's concern is understandable, as he does not dispute Holywell's contention that under Section 506(b) of the Code, a post-petition interest credit is *only* appropriate for an oversecured creditor. *See United Sav. Ass'n* v. *Timbers of Inwood Forest*, 108 S.Ct. 626, 631 (1988). It is also undisputed that BONY applied a $27,050,115.02 credit towards the purchase price of the Miami Center project representing post-petition interest.

While Holywell did not initiate this dispute, it strenuously takes issue with the bankruptcy court's two recent findings, first that BONY was not undersecured, and second that BONY was "entitled to receive" the $27 million credit. In addition to the original bankruptcy court order, Holywell has directed the Court's attention to other evidence on the security issue, in particular statements made by both BONY's counsel, Mr. Vance Salter, Esquire, and Smith's former counsel, Mr. Irving Wolff, Esquire.

At a hearing held before this Court on January [10], 1986, the Court inquired of Salter whether BONY had taken all relevant factors into account in drawing its conclusion that "the bank is undersecured?" Mr. Salter responded "Yes indeed." In fact, Salter was addressing the very same statement in the bankruptcy court's order which referred to BONY as an undersecured creditor.

Secondly, Wolff and appellees are defendants to an action pending in the United States District Court for the Western District of Virginia, *Twin Development Corporation v. Fred Stanton Smith, Bank of New York, and Irving Wolff*, 87-0037-C (W.D. Va.). In certain answers

to interrogatories propounded to Wolff in that case, he reveals that the trustee herein sought and obtained indemnification from BONY "because the Confirmation Order found the Bank to be an undersecured creditor, and in the closing adjustments the Bank took credit for post-filing interest in the amount of $27,050,115." This indicates that the trustee sought to protect his position due to concern over the credit for post-petition interest provided for in the Plan of reorganization.

### *IV. The Eleventh Circuit*

The bankruptcy court entered its declaratory judgment order after the Eleventh Circuit issued its second opinion dismissing as moot the debtors' challenge to the Plan. This second opinion modified the Eleventh Circuit's first opinion, but nonetheless dismissed the appeal as moot. The Eleventh Circuit had concluded that the debtors' failure to obtain a stay pending appeal rendered the appeal to the Eleventh Circuit moot because the court could not order relief without compromising the integrity of the sale of the property. 820 F.2d at 376. As the Plan of reorganization had already been substantially consummated, the court found that it could not grant "effective judicial relief." 820 F.2d at 380.

The Eleventh Circuit's final order, issued upon a suggestion for rehearing en banc, expanded and elaborated on the mootness issue. The court essentially affirmed the reasoning in its earlier decision that the sale of the Miami Center project rendered substantive challenges to the Plan moot. But for the first time the Eleventh Circuit held that this mootness principle meant that the District Court itself should have decided Holywell's appeal on mootness grounds, instead of reaching the merits.

The Eleventh Circuit held that mootness precluded the District Court from reaching the merits although the debtors did not seek to get the property back. 838 F.2d

at 1555. The court rejected debtors' request to have the Miami Center project revalued to a higher figure, and to have a realignment of certain priorities and claims, because "the consequences of what debtors seek strike at the sale to the bank and the reorganization plan as a whole." *Id.* at 1556.

### *V. A premature ruling*

The bankruptcy court would have done well to wait until the Eleventh Circuit issued a mandate on the *Miami Center* decision. The final opinion by the Eleventh Circuit makes it crystal clear that it is no longer appropriate for the bankruptcy court to re-visit the substantive merits of the confirmed Plan. The overarching meaning of the Eleventh Circuit's opinion is that it will not countenance the "piecemeal dismantling" of the Plan. 838 F.2d at 1555. Consequently, the question of whether BONY was "entitled" to obtain the $27 million credit is no longer subject to adjudication.

Whether or not BONY was "entitled" to obtain the credit for post-petition interest, the credit is now lawful in the sense that it is an integral component of the confirmed Plan. The Eleventh Circuit has declared that "[t]he bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified . . . ." 838 F. 2d at 1557. The Plan unmistakably provided for BONY to have a credit for interest and expenses accruing through the date of closing, and the closing statement itself specifically provided for "[i]nterest to October 9, 1985."

Although the credit itself is not subject to collateral attack at this late date, the validity of the credit under Section 506(b) as a matter of law must remain unanswered. BONY has filed a motion to dismiss this

appeal as moot, which relies upon the reasoning in the Eleventh Circuit's third opinion. But granting this motion would leave the bankruptcy court's declaratory judgment untouched, something which is inappropriate given the mootness doctrine.

Thereupon, BONY's motion to dismiss this appeal as moot be, and the same is, hereby DENIED. The bankruptcy court's December 18, 1987 Order entering judgment on Count III of Smith's adversary complaint be, and the same is, hereby VACATED. Given this disposition, this case is REMANDED to the bankruptcy court with directions to dismiss Count III of the trustee's adversary complaint.

DONE AND ORDERED in Chambers at Miami, Florida this 21st day of July, 1988.

/s/ Sidney M. Aronovitz
United States District Judge

**APPENDIX C**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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Case Nos. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. Proc. No. 87-0523-BKC-SMW-A

---

IN RE: HOLYWELL CORPORATION, *et al.*, DEBTORS.

---

FRED STANTON SMITH, as TRUSTEE OF THE
MIAMI CENTER LIQUIDATING TRUST,
*Plaintiff*,

v.

THE BANK OF NEW YORK,
HOLYWELL CORPORATION, MIAMI CENTER CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
CHOPIN ASSOCIATES and THEODORE B. GOULD,
*Defendants*.

---

Proceedings in Chapter 11

---

[Filed December 18, 1987]

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## ORDER ON DEBTORS' "UNDERSECURITY" CLAIM

---

SIDNEY M. WEAVER, *Bankruptcy Judge*:

THIS ADVERSARY PROCEEDING was tried on December 8, 1987. Count III of the Complaint prays for a declaratory judgment on the Debtors' claim that The Bank of New York (the "Bank") was an undersecured creditor and therefore not entitled to a credit for post-petition interest when the Bank purchased the Miami Center Project.

Having reviewed the pleadings, the prior findings establishing the value of the Bank's collateral and the amount of the Bank's lien, the provisions of the confirmed plan, and applicable law, and having heard argument of counsel, it is hereby ORDERED AND ADJUDGED that:

1. The Bank was not an undersecured creditor in these reorganization proceedings.

2. As to Count III of the Liquidating Trustee's Complaint, judgment is therefore entered in favor of the Liquidating Trustee and the Bank, and against the claims of the Debtors.

SO ORDERED in Chambers at Miami, Florida, this 18th day of December, 1987.

/s/ Sidney M. Weaver
United States Bankruptcy Judge

## APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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Case Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

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IN RE: HOLYWELL CORPORATION, *et al.*, DEBTORS.

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Proceedings in Chapter 11

---

[Filed August 8, 1985]

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## CONFIRMATION ORDER

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THOMAS C. BRITTON, *Bankruptcy Judge*:

These five chapter 11 debtors are owned, controlled and dominated by the individual debtor, Theodore B. Gould. On February 15, the debtors filed separate, but identical plans. Eleven days later, the Bank of New York, the major creditor whose claim is undersecured and hopelessly in default, filed an alternative plan. The competing plans were submitted simultaneously to the creditors for their separate acceptance or rejection and a joint confirmation hearing was held on April 29. Al-

though conventional wisdom under the previous Act has been that creditors cannot be relied upon to understand and vote upon more than one plan at a time, the simultaneous submission of competing plans is clearly authorized. 11 U.S.C. § 1129(c); B.R. 3018(c). I am convinced that the risk of confusion was acceptable in this instance.

All parties are agreed that the debtors' assets, principally a major office building and luxury hotel in downtown Miami must be liquidated and the sooner the better. The bank's plan rests upon a firm commitment by the bank to purchase the property for $255.6 million. The debtors' plans are based upon a "contract" to sell the property to an individual, Hadid, for a substantially higher price. However, there is no binding commitment from Hadid, who in effect has an option for which he paid nothing. The debtors have been in this court for nearly a year and have, so far, been unable to produce a firm contract at any price.

The competing plans differ significantly in their respective classification and treatment of creditors.

Because of the continuing and rapid escalation of the debtors' debt, this case could not tolerate the delay which would be caused by a separate and consecutive consideration of these competing proposals. In retrospect, there has been no indication that the creditors were befuddled by the simultaneous submission of the alternative plans.

By an overwhelming margin, the creditors (measured by the dollar amount of their claims) have demonstrated a preference for the bank's plan. The percentage of creditors who voted to *reject* each plan with respect to each of the five debtors was as follows:

| | Debtors' Plans | BONY Plan |
|---|---|---|
| Holywell | 97% Rejection | 15% Rejection |
| MCLP | 80% " | 10% " |
| MC Corp. | 99% " | 10% " |
| Chopin | 99% " | 0.1% " |
| Gould | 80% " | 12% " |

Each of the creditors' committees has elected to support the bank's plan.

The substantial sums involved coupled with the simultaneous consideration of competing plans have resulted in spirited litigation between the two camps on a number of issues. The circumstances do not require and time simply does not permit a review and discussion of all these issues in this order. If this court had permitted the attorneys to do so, the charges, countercharges, law suits, briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The principal support for the debtors' plans and, therefore, the major attack on the bank's plan comes from Gould and Olympia & York Florida Equity Corp. O. & Y. leased virtually all the furniture, fixtures and equipment required for the two large buildings. It has never received any payment. The bank has contended that the leases were not "true leases" but instead were unperfected financing agreements. By a judgment entered in an adversary proceeding on July 17, 1985, I rejected the bank's contention and agreed with O. & Y. The bank has appealed that decision and has filed a Second Amendment to Plan (C.P. No. 854) by which it in effect guarantees payment in full of the O. & Y. claim of $14.4 million, if the bank is unable to obtain a reversal of my decision.

The bank's plan subordinates the O. & Y. claim to the payment of all other unaffiliated creditors. By this order I am approving that classification. O. & Y. will surely seek review. The bank's Second Amendment to its plan assures the funding necessary to pay the claim in the event my decision with respect to subordination is reversed.

The remaining issues between the bank, on the one hand, and O. & Y. and the debtor MCLP (of which O. & Y. is, with Gould, a joint general partner) do not merit further elaboration here.

The debtors' major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

Gould's other major criticism of the bank's plan is its provision for a modified form of substantive consolidation proposed by the plan and approved by me in an order entered on July 23. (C.P. No. 840). There is a pending application for rehearing and reconsideration of that order. No new points are raised and rehearing is denied. The issue was aired at great lengths and no purpose would be served by a repetition here of the analysis and comments made by the court, on the record at the end of that hearing.

Gould's remaining contentions do not, I think, require discussion.

During the confirmation process, the bank entered into a stipulation with a creditors' committee on April 29. (C.P. No. 614). There was an addendum to that stipulation on the same day. (C.P. No. 564) A second addendum was agreed upon on May 30 (C.P. No. 709(c)), and a third addendum was agreed upon on July 30. (C.P. No. 855) That stipulation as modified is approved.

I find that the Amended Plan (C.P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C.P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C.P. No. 546) the cram

down provisions of § 1129(b)(1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the bank's plan. That plan, as amended, is confirmed.

The several plans filed by the debtors do not meet the foregoing statutory requirements. They have been rejected by the creditors and confirmation is denied with respect to each of the debtors' plans.

DONE and ORDERED in Miami, Florida this 8th day of August 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
U.S. Bankruptcy Judge

## APPENDIX E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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Case Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

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IN RE: HOLYWELL CORPORATION, *et al.*, DEBTORS.

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Proceedings in Chapter 11

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[Filed December 31, 1984]

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## ORDER ON EMERGENCY MOTION TO TREAT PROCEEDS OF THE SALE AS CASH COLLATERAL, TO SEGREGATE AND ACCOUNT FOR CASH COLLATERAL

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THOMAS C. BRITTON, *Bankruptcy Judge*:

The Bank of New York ("BNY"), a secured creditor, moved this Court, pursuant to Bankruptcy Code § 363 and Bankruptcy Rules 4001 and 9014, for an order to compel the Debtors in these jointly administered Chapter 11 proceedings to deem the proceeds of the sale of certain real and personal property (the "Washington Proper-

ties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on August 28, 1984, between Hadid Investment Group as purchaser and Twin Development Corporation ("TDC"), 1300 North 17th Street Associates ("1300"), 1616 Reminc Limited Partnership ("1616"), Eleven Dupont Circle Associates ("Dupont Circle"), and Dupont Land Associates ("Dupont Land") as sellers (the "Purchase Agreement") as cash collateral.

The Court examined the memoranda which were filed both in support of and in opposition to the Motion of BNY, and having heard representation by the attorneys for Debtors, Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), as well as argument by the parties hereto, the Court finds as follows:

(a) This Court entered an Order on the 11th day of December, 1984, requiring that all of the beneficial interests of Gould and Holywell to the net proceeds from the sale of the Washington Properties are to be placed in a segregated, interest bearing account and held pursuant to further order of this Court.

(b) BNY appears to have a first lien on the interests of Holywell and Gould in the net proceeds from the sale of the Washington Properties, except for an amount of $264,669. Attorneys for the Creditors' Committees did not object to the claim of BNY at this hearing, although they have reserved the right to contest BNY's claim to a first lien at a future time if they desire to do so.

(c) Holywell provides administrative support for each of the selling entities, their partners, limited partners, and to the service companies which heretofore have been providing services to the Washington Properties. It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are termi-

nated and all obligations to the Internal Revenue Service are determined and paid.

(d) Holywell, after the sale of the Washington Properties, no longer will have any source of income except from the net proceeds of that sale and any interest it may receive from the investment of those net proceeds. Therefore, Holywell requires the use of a portion of the net proceeds of that sale in the immediate future to pay current, ordinary business expenses, including salaries, and will continue to require monies from either the net proceeds of the sale or interest income from the investment of those proceeds until such time as Holywell can wind up the affairs of those selling entities.

(e) BNY has agreed to the use of the proceeds of the sale and/or interest for the expenses of Holywell subject to the prior approval by BNY of those expenses, and has agreed to an amount of $70,000 to be released immediately for the payment of December salaries payable on December 31, 1984, and other business expenses payable in January, 1985.

Upon consideration of the following, it is ORDERED and ADJUDGED as follows:

1. This Court's Order of December 11, 1984 shall continue unchanged except as supplemented herein.

2. The net proceeds of the Washington sale constitute cash collateral as defined in § 363 of the Bankruptcy Code.

3. The Bank of New York has a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington properties, as well as the interest which shall accrue from the investment of those proceeds, except for an amount of $264,669. However, the Holywell and Gould Creditors' Committees or other creditors of Holywell and Gould, or the Debtors, may contest the lien of Bank of New York in subsequent, appropriate proceedings.

4. An amount of $70,000 shall be released immediately to Holywell to pay its salaries and other business expenses due on December 31, 1984 and during January 1985.

5. Holywell shall submit to the Bank of New York each month its anticipated expenses, including salaries, for the subsequent month. If the Bank of New York approves those expenses as submitted, they will be released without further order of this Court.

DONE and ORDERED in Miami, Florida this 31st day of December 1984.

/s/ Thomas C. Britton
THOMAS C. BRITTON
U.S. Bankruptcy Judge

No. 90-1551

MAY 7 1991
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1990

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, THEODORE B. GOULD, MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,

*Debtors,*

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, THEODORE B. GOULD, MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,

*Petitioners,*

vs.

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, and the BANK OF NEW YORK,

*Respondents.*

## BRIEF OF FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTION FOR REVIEW

Where the confirmed and substantially consummated plan of reorganization provides for the Bank of New York to receive post-petition interest on its claim even though the order of confirmation states the bank is undersecured, and the bank received the post-petition interest in 1985, did the Eleventh Circuit Court of Appeals err in affirming the district court's dismissal as moot of the action for a declaratory judgment on the question of whether the bank was undersecured and thus not entitled to post-petition interest?

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## STATUTES AND CONSTITUTIONAL PROVISIONS

### 11 U.S.C. Section 363(m) Use, sale, or lease of property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

### 11 U.S.C. Section 506 Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an alleged secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable,

necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless –

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

**11 U.S.C. Section 1127(b) Modification of plan.**

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

**U.S. Const. Art. III, Section 2**

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two

> or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> * * *

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, *Holywell Corp. v. Bank of New York*, No. 88-5770 slip op. (11th Cir. Jan. 9, 1991), appears at App. A at 1a;[1] The decision of the United States District Court for the Southern District of Florida, *Holywell Corp. v. Smith*, No. 88-151 slip op. (S.D. Fla. July 21, 1988), appears at App. B at 3a; and the decision of the United States Bankruptcy Court for the Southern District of Florida, *Smith v. Bank of New York*, No. 87-0523 slip op. (Bankr. S.D. Fla. Dec. 18, 1987) appears at App. C at 10a.

## JURISDICTION

The Court lacks jurisdiction over the Petition for Writ of Certiorari because the issue of whether the Bank of New York was entitled to post-petition interest is moot. The Eleventh Circuit's decision of January 9, 1991 to that effect does not conflict with any decision of this Court or the courts of appeals, and does not present an important

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[1] References to the Appendix attached to the Debtor's Petition for Writ of Certiorari will be by the symbol "App. ___."

question of federal law which has not been, but should be settled by this Court. *See* S.Ct.R. 10.1(a)-(c).

## STATEMENT OF THE CASE

Respondent Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust (hereinafter "Liquidating Trustee"), filed an adversary proceeding against the Bank of New York (hereinafter "bank") and the Debtors[2] in which the Liquidating Trustee sought declaratory relief on the question of whether the bank was undersecured and thus not entitled to post-petition interest.[3] The matter was tried before the bankruptcy court, which held that the bank was not an undersecured creditor. App. C at 10a.

The district court reversed, holding that the bankruptcy court should have dismissed that portion of the adversary complaint as moot in light of the Eleventh Circuit's decision in *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 123, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988), dismissing as moot the Debtor's appeal of the confirmation order. The

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[2] The Debtor-Petitioners are Theodore B. Gould and four entities he entirely owns or controls – Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation and Chopin Associates. *See Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1548 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed 2d 46 (1988).

[3] The Liquidating Trustee also sought a determination of adjustments to the purchase price of the Miami Center.

district court reasoned that the plan allowed for the payment of post-petition interest to the bank, and that "it is no longer appropriate for the bankruptcy court to re-visit the substantive merits of the confirmed plan. The overarching meaning of the Eleventh Circuit's opinion is that it will not countenance the 'piecemeal dismantling' of the plan. 838 F.2d at 1555. Consequently, the question of whether [the bank] was 'entitled' to obtain the $27 million [representing post-petition interest] is no longer subject to adjudication." App. B at 8a.

The Debtors appealed to the Eleventh Circuit, which affirmed and stated:

> This appeal is one of a seemingly unending stream of appeals arising out of the Chapter 11 bankruptcies of several debtors involved in the Miami Center project. The general background of the project is described in our previous opinions and will not be repeated here. *See e.g., Miami Center Ltd. Partnership v. Bank of New York,* 838 F.2d 1547 (11th Cir.), *cert. denied,* 488 U.S. 823, 109 S.Ct. 69 (1988).
>
> In this appeal, appellants challenge a $27 million credit received by the Bank of New York toward the purchase price of the project. This credit was part of the now substantially consummated plan of reorganization, and appellants' challenge thus is moot. *See id.* This appeal therefore is DISMISSED.

App. A at 2a. The Eleventh Circuit also found the Debtors' appeal to be "frivolous." *Id.*

## FACTS

This is the Debtors' tenth attempt at review in this Court – eight have been unsuccessful,[4] and one, only recently filed, has not yet been decided.[5]

The Debtors were the developers of the Miami Center, a hotel and office building complex in downtown Miami. They filed voluntary Chapter 11 petitions in 1984 shortly after the bank instituted foreclosure proceedings. At that time, the Debtors owed some $350 million to over 400 creditors, with the bank being their largest creditor. *Miami Center*, 838 F.2d at 1548.

In 1985, the bankruptcy court confirmed a plan of reorganization proposed by the bank.[6] Its central features were:

> (a) Substantive consolidation of the Debtors' bankruptcy estates;
>
> (b) the creation of the Miami Center Liquidating Trust, consisting of all of the Debtors' assets as defined by 11 U.S.C. Section 541(a), including the Miami Center and proceeds from the pre-confirmation sale of other realty;
>
> (c) appointment of a trustee of the Miami Center Liquidating Trust;

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[4] Case numbers 87-1988, 87-1989, 88-80, 89-864, 89-708, 89-917 and 90-676.

[5] Case Numbers 90-1361, 90-1484.

[6] The Debtors' creditors overwhelmingly approved the bank's plan over one proposed by the Debtors. *See Miami Center*, 838 F.2d at 1548.

(d) the purchase of the Miami Center by the bank for $255.6 million, to be paid by cancellation of the Debtors' obligations to the bank (some $242 million), plus a cash payment of $13.6 million; and

(e) the bank's release to the trust of approximately $30 million in cash collateral, representing proceeds from the pre-confirmation sale of other realty.

The bankruptcy court confirmed the plan in August, 1985. *See Holywell Corp. v. Bank of New York*, 54 Bankr. 41 (Bankr S.D. Fla. 1985). Curiously, the order confirming the plan stated the bank was undersecured, yet the plan which it confirmed expressly provided for the bank to receive post-petition interest. Liquidating Trustee's App. A at 1a.[7]

When the Debtors failed to post a supersedeas bond, the plan was implemented according to its terms on October 10, 1985 with the sale of the Miami Center to the bank for $255.6 million, the price set by an MAI appraisal. *Miami Center*, 838 F.2d at 1549. At the closing, the bank received a $27 million credit, representing post-petition interest provided for in the plan.

Prior to confirmation of the plan, the bankruptcy court entered its Judgment Determining Amount, Validity and Extent of Liens of the Bank of New York, in which the court found the bank's lien included the right to post-petition interest. That order fixed the bank's mortgage

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[7] References to the appendix attached hereto will be by the symbol "Liquidating Trustee's App. ___."

lien at $234 million, plus accruing interest. Trustee's App. B at 5a-6a.

The bank's collateral securing its loans to the Debtors included the Miami Center (with an MAI appraised value of $255.6 million), approximately $30 million, representing the proceeds from the sale of other realty, and the stock of the Debtors' wholly-owned subsidiary corporations. *See Holywell Corp.*, 59 Bankr. at 352.

The Debtors previously argued in a separate appeal to the district court that " . . . the Bank is – and has consistently admitted it is *over*secured by virtue of the current value of the hotel and office building alone." Liquidating Trustee's App. C at 9a.

In its dismissal of the Debtors' appeal from the order of confirmation, the Eleventh Circuit concluded that it is "legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation." *Miami Center,* 838 F.2d at 1557. In so holding, that court noted:

> The bank agreed to give up its judgment, calculated at closing at around $242 million. The amount due under the mortgage and brought forward into the judgment was calculated at "good standing" interest rates; by agreeing to this calculation, the bank surrendered a claim to $5 million-$6 million of interest at default rates. Presumably if the sale goes for naught the bank would be entitled to this additional amount.
>
> Closing the sale to the bank stopped the running of interest of approximately $2 million per month. If the sale goes for naught, presumably the bank can seek interest from October, 1985, producing an accrual when Judge

Aronovitz entered his March 1986 order of approximately $11 million and currently approximately $54 million.

The bank bargained for and purchased the FF & E as part of the sale. Because litigation was in progress over whether title to the FF & E was in lessors of the bankrupt, the bank put up $14 million to pay the lessors if they prevailed. But, since the bank would then have paid twice for the same assets, it was given a trustee's certificate enforceable against assets of the estate to protect it from the double payment. Without the trustee's certificate, if double payment ensues, the bank will become an unsecured creditor to the extent of some $14 million. The debtors do not suggest any relief for this risk.

The bank put up $12.5 million of its own money to make up the purchase price. It surrendered $30 million of cash collateral it was holding. These funds have been the primary source for payments to creditors and reserves totaling approximately $30 million. The trustee appeared before the district court when, after remand, it heard argument. He pointed out that he had paid some $14 million in claims, had reserved some $9 million for claims disputed or in litigation, and held some $8 million-$9 million in cash plus some $7 million in a reserve for contested taxes. The trustee pressed his view that the reorganization plan had to be accepted or rejected in its entirety and that rejection would require him to seek to reclaim what he had paid out, much of which was unrecoverable.

The bank might, of course, not wish to become purchaser of the property at an elevated price or to assume the risk of paying twice for FF & E. It might wish to realize on the cash collateral it had held and to foreclose on the real estate. The debtors have not given a meaningful

> suggestion of how the bank can get back its $12.5 million or get back the $30 million cash collateral; they say only that creditors have some or all of it and are entitled to be paid and that the trustee need not seek to recover back from them.
>
> The bank bargained for dismissal of the separate suit as part of the consideration running to it. The debtors want the case reinstated but do not point to any means of restitution to the bank for being again placed at risk of a fraud/RICO case and subjected to attorney fees for its defense.

*Miami Center*, 838 F.2d at 1556.

The Eleventh Circuit thereafter dismissed the appeal of the confirmation order as moot, and this Court denied both certiorari and mandamus. *Miami Center Limited Partnership v. Bank of New York*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988); *In re Gould*, 69 S.Ct. 148 (1988).

In order to clarify the apparent inconsistency between the statement in the confirmation order that the bank was undersecured with the plan provision allowing post-petition interest, the Liquidating Trustee filed an adversary complaint seeking declaratory relief on the question of whether the bank was, in fact, undersecured and therefore, not entitled to post-petition interest. *See* 11 U.S.C. Section 506(b). The bankruptcy court determined the bank was not undersecured. App. C at 10a.

The Debtors appealed to the district court, which dismissed the appeal as moot because the confirmed and substantially consummated plan of reorganization provided for the bank to receive post-petition interest, and the terms of the plan could not be revisited. The district

court determined that the Eleventh Circuit's dismissal of the appeal of the confirmation order as moot precluded review of this latest challenge to the plan of reorganization. App. B at 8a. The Eleventh Circuit thereafter affirmed. App. A at 1a.

As part of their effort to obtain certiorari, the Petitioners have attempted to create an artificial link between this petition and the petitions they and the United States of America filed from an unrelated Eleventh Circuit decision holding that the Liquidating Trustee is not responsible for certain federal income taxes. *United States v. Smith*, 911 F.2d 1539 (11th Cir. 1990). In that tax decision, the Eleventh Circuit held the trust is not responsible for taxes incurred, if any, on gain from the sale of the Debtors' realty because the plan did not provide for such taxes and because the Miami Center Liquidating Trust is not a taxable entity. 911 F.2d at 1542-47. The Petitioners in this case argue they are trying to recoup for the Miami Center Liquidating Trust the post-petition interest paid to the bank in order to create a fund for the payment of those alleged taxes. This argument presumes both that the trust owes these taxes and that the amount of the taxes has been liquidated. Neither is true. Even in the event this Court were to reverse the Eleventh Circuit's tax decision, that decision has no bearing on whether certiorari should issue in this case. The issue here is not whether there is a need to create a fund to pay an unproven tax liability, but whether the determination, *vel non* of the bank's undersecurity is moot and, therefore, unreviewable.

## SUMMARY OF ARGUMENT

The doctrine of mootness is well established and has been uniformly applied by this Court and the courts of appeals. The Petitioners entirely fail to demonstrate the existence of a conflict between the Eleventh Circuit's application of the mootness doctrine and the law of this Court or other courts of appeals.

The Petitioners' argument that the Eleventh Circuit exceeded its authority in applying the mootness doctrine is entirely without merit. Whether an issue can be rendered moot is appropriately left for courts to decide. It is not a decision for Congress to legislate since its application requires a live case or controversy pursuant to Article III of the Constitution. The Petitioners imply that this issue is an important question of federal law which has not been, but should be settled by this Court, but they cite no authority to support this position.

In addition, the argument is no more than a subtle attempt to reargue their earlier failure to obtain certiorari review of the Eleventh Circuit's dismissal of their appeal of the confirmed plan of reorganization as moot. The issue is barred by the doctrine of *res judicata*. Certiorari should not be granted to collaterally challenge prior court orders which are otherwise unreviewable.

It is the law of this case that the confirmed plan provides for the payment of post-petition interest. That interest was paid in 1985 when the bank took a credit at the closing of the sale of the Miami Center, pursuant to the plan. These facts cannot be undone, and the courts cannot now modify the confirmed and substantially consummated plan.

## ARGUMENT

## I.

## REASONS FOR DENYING THE WRIT

## A.

### The Eleventh Circuit's Decision Does Not Conflict With Existing Law

The Petitioners have failed to demonstrate the existence of a conflict between the Eleventh Circuit's decision and any other decision of this Court or other courts of appeals.

Reliance on *In re Joshua Slocum Ltd.*, 922 F.2d 1081 (3rd Cir. 1990) as a basis for conflict jurisdiction fails because a plain reading of the case demonstrates no conflict exists. In fact, *Joshua Slocum* represents the traditional analysis given mootness questions, and its facts are entirely distinguishable.

In that case, paragraph 20 of the debtor's lease with the landlord allowed either of them to terminate the lease if the debtor's annual sales fell below a certain figure, and provided further that the debtor would pay additional rent if gross sales reached a certain figure. *Joshua Slocum*, 922 F.2d at 1084. After the debtor filed for bankruptcy protection, the trustee moved for authority to assume and assign the lease under 11 U.S.C. Section 365, and to excise paragraph 20 of the lease. The bankruptcy court granted the motion over the landlord's objections and the trustee assigned the lease to a third party free of the obligations imposed by paragraph 20. *Id.* The court subsequently held paragraph 20 be to unenforceable. *Id.* The landlord appealed, arguing the issue was whether the bankruptcy court had the power to excise a paragraph

from a lease. 922 F.2d at 1083. The trustee argued the appeal was moot pursuant to 11 U.S.C. Section 363(m) because the landlord did not obtain a stay and the lease had already been assigned. 922 F.2d at 1085.

The court held the case was not moot, and agreed with the landlord that the issue was not over the lease assignment, but whether the bankruptcy court had authority to change the terms of the lease when authorizing its assignment. 922 F.2d at 1085. The trustee *conceded* that Bankruptcy Code Section 363(m) does not apply to assignments of leases, and the court refused to extend the applicability of that section to assignments. *Id.*

The Third Circuit stated that "[w]e have been willing to go beyond the statutory framework and dismiss an appeal as moot, where, *during the pendency of the appeal*, events occurred preventing the appellate court from granting effective relief." *Id.* (emphasis appears in original). The Court held, however, that "there was no intervening event that altered the rights of the Trustee *vis-a-vis* [the landlord]." 922 F.2d at 1086. "The action the Trustee claims to have mooted, i.e., the assignment of the lease, is not the action appealed from and not the action upon which we base our decision. The excisement of paragraph 20 is the action presently before us, and the Trustee has presented no argument to the effect that the issue has been mooted during the pendency of the appeal. **Thus, effective relief can be granted in this case.**" *Id.* (emphasis supplied).

Petitioners contend that the court in *Joshua Slocum* declined to follow the Eleventh Circuit's prior decision

dismissing as moot the Debtors' appeal of the confirmation order (Petition for Writ of Certiorari at 20), and then claim the majority in *Joshua Slocum* rejected the dissent's reliance on *Miami Center*, 838 F.2d at 1553 – the same decision the Eleventh Circuit held was controlling in this case. This argument has no merit, for the majority in *Joshua Slocum* stated:

> While we are essentially in agreement with the dissent's well-reasoned analysis, we differ as to the appropriate starting point of the inquiry. If we started the analysis with the assignment, and not with excisement of paragraph 20, we would probably reach the same result.

922 F.2d at 1086. The *Joshua Slocum* court further stated: "Nor do we, in this opinion, overturn 'a transaction that has long since been consummated,' dissenting opinion at 1093 . . . " 922 F.2d at 1086 n. 2.

Clearly then, *Joshua Slocum* fails to demonstrate the existence of any conflict with the Eleventh Circuit's decision concluding that any issue concerning the confirmed plan's provision for post-petition interest is now moot. In this case, no effective relief could be granted because, *inter alia*, the transaction has long since been consummated. Moreover, in the decision dismissing the Debtors' appeal of the confirmation order, the Eleventh Circuit held: "Section 363(m) does not apply where the debtor's assets have been sold, as here, by a liquidating trustee pursuant to a plan of liquidation. *All parties agree that in this case we look for guidance to the case law.*" *Miami Center*, 838 F.2d at 1553. Thus, the Petitioner's argument that the Eleventh Circuit unlawfully extended Section 363(m) (and their reliance on *Joshua Slocum*) is misguided. As

was conceded in the appeal of the confirmation order, whether the appeal is moot is based on case law; that law unequivocally supports the application of the mootness doctrine in this case, as discussed more fully, *infra*.

B.

**The Petition For Writ Of Certiorari Is A Collateral Attack On The Confirmed Plan**

There is no doubt that in filing this petition for writ of certiorari, the Debtors seek another chance to challenge the confirmed and substantially consummated plan of reorganization. The claim that they do not seek to undo the sale of the Miami Center, which was mandated by the plan, rings hollow, for to set aside the payment of post-petition interest undoes the plan in a piecemeal fashion. The Debtors cannot pick and choose which aspects of the plan should stand and which should fail.

The Eleventh Circuit's decision in *Miami Center* is controlling in this case. The district court's determination that the issue of the bank's entitlement to post-petition interest should be dismissed as moot says it clearly and needs no further elaboration:

> The final opinion by the Eleventh Circuit makes it crystal clear that it is no longer appropriate for the bankruptcy court to revisit the substantive merits of the confirmed plan. The overarching meaning of the Eleventh Circuit's opinion is that it will not countenance the 'piecemeal dismantling' of the Plan. 838 F.2d at 1555. Consequently, the question of whether [the bank] was 'entitled' to obtain the $27 million credit is no longer subject to adjudication.

> Whether or not [the bank] was 'entitled' to obtain the credit for post-petition interest, the credit is now lawful in the sense that it is an integral component of the confirmed Plan . . . . The Plan unmistakably provided for [the bank] to have a credit for interest and expenses accruing through the date of closing, and the closing statement itself specifically provided for '[i]nterest to October 9, 1985.'
>
> Although the credit itself is not subject to collateral attack at this late date, the validity of the credit under Section 506(b) as a matter of law must remain unanswered.

App. B at 8a.

It is well-settled principle that a confirmed and substantially consummated plan cannot be modified. *See* 11 U.S.C. Section 1127(b); *In re Seminole Park & Fairgrounds, Inc.*, 505 F.2d 1011, 1014 (5th Cir. 1984); *Claybrook Drilling Co. v. Divanco, Inc.*, 56 Bankr. 55, 57 (Bankr. D. Me. 1985); *In re Northampton Corp.*, 59 Bankr. 963, 968-69 (E.D. Pa. 1984); *In re Hayball Trucking, Inc.*, 67 Bankr. 681, 684 (Bankr. E.D. Mich. 1986); *In re AT of Maine, Inc.*, 56 Bankr. 55 (Bankr. D. Me. 1985); *In re Heatron*, 34 Bankr. 526 (Bankr. W.D. Mo. 1983). The confirmed plan, which provides for post-petition interest, is the law of this case and is binding on the Debtors. *Miami Center, supra; see also In re St. Louis Freight Lines, Inc.*, 45 Bankr. 546, 551 (Bankr. E.D. Mich. 1984).

The relief the Debtors seek strikes at the core of the plan, and "must be set against what the bank bargained for, and received, as part of the reorganization plan. . . ." 838 F.2d at 1556. In its analysis of this aspect of the mootness issue in the Debtors' appeal of the confirmation

order, the Eleventh Circuit found ample support for its conclusion which is equally applicable to this appeal:

> The bank agreed to give up its judgment, calculated at closing at around $242 million. The amount due under the mortgage and brought forward into the judgment was calculated at good standing interest rates; by agreeing to this calculation the bank surrendered a claim of $5 million – $6 million of interest at default rates. Presumably if the sale goes for naught the bank would be entitled to this additional amount.
>
> Closing the sale to the bank stopped the running of interest at approximately $2 million per month. If the sale goes for naught, presumably the bank can seek interest from October, 1985, producing an accrual when Judge Aronovitz entered his March 1986 order of approximately $11 million and currently approximately $54 million.

838 F.2d at 1556.

Indeed, the bank might never have proposed the plan of reorganization unless it were allowed payment of post-petition interest. The Eleventh Circuit has already held that the "bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and its fairness, feasibility, and propriety had been verified, and that it had become legally and practically impossible to unwind the consummation of the plan or otherwise restore the status quo before confirmation." *Miami Center*, 838 F.2d at 1557. Thus, the issue of whether the bank was undersecured is now moot because there is no longer any way to fashion meaningful relief.

The Debtors make their now shop-worn argument that the provisions of a confirmed plan must comply with applicable statutory requirements, and that the failure to comply in this case means the bank is not entitled to post-petition interest. This argument is entirely without merit in light of the fact that any present attack on the merits of the plan is moot. *See Miami Center, supra.* All of the arguments the Debtors have concerning the terms of the sale of the Miami Center, which is governed exclusively by the confirmed plan, were or should have been raised in their appeal of the order of confirmation. To do so now demonstrates a studied disregard of this Court's prior denial of certiorari and mandamus from the Eleventh Circuit's dismissal of the appeal of the confirmation order as moot.

The Debtors bandy numbers in an attempt to show that the bank was undersecured and thus not entitled to post-petition interest. These calculations are not the subject of any court order and are clearly beyond the scope of the record. They are *dehors* the record and should be treated accordingly. *See Harmelin v. Michigan,* 59 U.S.L.W. 3324 (October 30, 1990). All of the challenges to the plan are over.

C.

**The Question Of Whether The Bank Of New York Is Undersecured And Therefore Not Entitled To Post-Petition Interest Is Moot**

Any contention that the Eleventh Circuit extended Section 363(m) in derogation of the law and that only

Congress can extend a statute is also moot, for the premise is not open for review. The issue concerning the bank's entitlement to interest is moot.[8]

Bankruptcy law is well established that an appeal of an order approving a sale may be dismissed as moot when the sale has been consummated and the court can no longer grant effective relief. *See In re Stadium Management Corp*, 895 F.2d 845 (1st Cir. 1990); *Kaonohi Ohara, Ltd. v. Sutherland*, 873 F.2d 1302 (9th Cir. 1989); *In re Onouli-Kona Land Co.*, 846 F.2d 1170 (9th Cir. 1988); *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 841 F.2d 92 (4th Cir. 1988); *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373 (9th Cir. 1987); *Matter of Andy Frain Services, Inc.*, 798 F.2d 1113 (7th Cir. 1986); *In re Sax*, 796 F.2d 994 (7th Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); *In re AOV Industries, Inc.*, 792 F.2d 793 (9th Cir. 1981); *Matter of Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977). Absent a stay of the order confirming a sale, the court must dismiss as moot a pending appeal challenging the sale once it becomes final. The court has no effective remedy available even if it would have determined the issues differently. *See, e.g., Stadium Management*, 895 F.2d at 847. In other words, there is no longer a case or controversy ripe for judicial review. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23

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[8] Judicial power to hear a case depends on the existence of a case or controversy, pursuant to Article III, Section 2 of the United States Constitution. *See Liner v. Jafco, Inc.*, 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964). There is simply no case or controversy after substantial consummation of the plan and in light of the Eleventh Circuit's decision in *Miami Center*.

L.Ed.2d 491, 502 (1969)(Mootness occurs when the issues presented are no longer "live.")

While former Bankruptcy Rule 805 governing mootness was not carried forward into Bankruptcy Rule 8005 in 1983, the Bankruptcy Code nonetheless provides that once a plan of reorganization has been substantially consummated, it cannot be modified. *See* 11 U.S.C. Section 1127(b).

The Debtor-Petitioners also complain that the mootness doctrine is not fair as applied to them because they could not afford to post the $140 million bond required to obtain a stay (the bond was reduced to $50 million by the district court). But fairness dictates that finality be applied to what did happen. The Debtors owed over $350 million to over 400 creditors when they sought protection in the bankruptcy court. The creditors overwhelmingly approved the bank's proposed plan of reorganization over one proposed by the Debtors. *Miami Center*, 838 F.2d 848. The bankruptcy court approved the plan and the district court affirmed the confirmation order on the merits in a comprehensive decision. *See Holywell Corp. v. Bank of New York*, 54 Bankr. 41 (Bankr. S.D. Fla. 1985), *aff'd*, 59 Bankr. 340 (S.D. Fla. 1986), *vacated with instructions to dismiss as moot sub nom, Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). That plan has been substantially consummated and is therefore no longer subject to challenge. The even-handed application of the mootness doctrine outweighs the Debtors' one-sided view of 'fairness.'

D.

**The Doctrine Of *Res Judicata* Bars Granting The Writ**

The doctrine of *res judicata* bars the issue of whether it was error for the Eleventh Circuit to extend Bankruptcy Code Section 363(m) to render moot an appeal of a confirmation order approving a sale of the Debtors' property.

As applied, *res judicata* means that "a party who has had a full opportunity to present a contention in court ordinarily should be denied permission to assert it on some subsequent occasion." Hazard, *Res Nova in Res Judicata*, 44 S.Cal.L.Rev. 1036 (1971). In other words, final judgment on a claim precludes a second action on that claim or any part of it. C. Wright, *Law of Federal Courts* 680 (4th Ed. 1983); *SeaLand Services, Inc. v. Gaudet*, 414 U.S. 573, 578-79, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974).

The Debtors' claim that they are not trying to undo the sale of the Miami Center to the bank, but only trying to recover a wrongfully paid credit for post-petition interest given the bank at the closing on the sale, is disingenuous. The confirmed plan, whether properly or not, provided for the bank to receive post-petition interest. That plan has been confirmed and substantially consummated. In the instant case, the Debtors now seek to change the terms of the sale and thus the terms of the confirmed plan.

This Court held in *Federated Department Stores v. Moitie* that a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981). This rule extends to all issues relevant to the claim

between the parties, regardless of whether raised in the first proceeding. *See Kaspar Wire Works, Inc. v. Leco Engineering & Machinery,* 575 F.2d 530, 535 (5th Cir. 1978). "The bar extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same 'operative nucleus of fact.' " *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir. 1984), *quoting Lovely v. Laliberte,* 498 F.2d 1261 (1st Cir.), *cert. denied,* 419 U.S. 1096, 95 S.Ct. 526, 42 L.Ed.2d 316 (1974).

The Debtors have already had a full opportunity to argue that the doctrine of mootness did not bar their challenge to the terms of the confirmed plan of reorganization in the appeal of the confirmation order. The Eleventh Circuit rejected that argument and this Court denied certiorari. *Miami Center, supra.* In *Moitie,* Chief Justice Rehnquist stated that "we do not see the grave injustice which would be done by the application of accepted principles of res judicata. 'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities of a particular case." 452 U.S. at 401, 101 S.Ct at 2429.

The question of whether it was not fair for the bank to receive post-petition interest under the plan is not open for further review. The plan provided for such interest and it is no longer subject to challenge. The district court recognized this in its dismissal of the Debtors' appeal:

> Whether or not [the bank] was 'entitled' to obtain the credit for post-petition interest, the

> credit is now lawful in the sense that it is an integral component of the confirmed Plan. The Eleventh Circuit has declared that '[t]he bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified. . . . ' 838 F.2d at 1557. The Plan unmistakably provided for the bank to have a credit for interest and expenses accruing through the date of closing, and the closing statement itself specifically provided for '[i]nterest to October 9, 1985.'
>
> Although the credit itself is not subject to collateral attack at this late date, the validity of the credit under Section 506(b) as a matter of law must remain unanswered.

App. B at 8a. The Debtors' failure to raise the issue in their appeal of the confirmation order precludes them from raising it now.

## CONCLUSION

For all of the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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*Counsel for Respondent Smith*

No. 90-1551

In The

# Supreme Court of the United States

October Term, 1990

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, THEODORE B. GOULD, MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,

*Debtors,*

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, THEODORE B. GOULD, MIAMI CENTER CORPORATION and CHOPIN ASSOCIATES,

*Petitioners,*

vs.

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, and the BANK OF NEW YORK,

*Respondents.*

## APPENDIX TO BRIEF OF FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## APPENDIX A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11 Proceedings

| | | |
|---|---|---|
| IN RE: | ) | CASE NOS. |
| HOLYWELL CORPORATION, et. al. | ) | 84-01590-BKC-TCB |
| | ) | 84-01591-BKC-TCB |
| | ) | 84-01592-BKC-TCB |
| Debtors | ) | 84-01593-BKC-TCB |
| | ) | 84-01594-BKC-TCB |

AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

*Bank, The Bank, BNY:* The Bank of New York.

*Bankruptcy Code or Code:* Title 11 U.S.C. Sections 101 *et seq.*

*Bankruptcy Rules:* The Bankruptcy Rules as prescribed by the Supreme Court of the United States, to take effect on August 1, 1983.

*BNY Debt:* The indebtedness, including interest at the pre-default contract rate to January 31, 1984 and at the post-default contract rate from February 1, 1984, due to BNY from MCLP and Chopin in the amount of approximately $234,342,743 as of March 14, 1985 plus expenses of approximately $1,611,563 to March 14, 1985.

*BNY Holywell Loan:* The $1,750,000 loan made by BNY to Holywell on October 23, 1983, which loan was guaranteed by Gould, plus interest to October 23, 1983 to August 31, 1984 at the pre-default contract rate and from September 1, 1984 at the post-default contract rate.

*Claim:* Any right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment against any of the Debtors in existence on or as of their respective Petition Dates as described in Section 101(4) of the Code.

## IV. MEANS FOR EXECUTION OF THE PLAN

### Sale of Miami Center

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the effective Date.

The purchase price would be paid and applied in the following manner:

> (a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.
>
> (b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee. The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of

* * *

## APPENDIX B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

| | |
|---|---|
| IN RE:<br>HOLYWELL CORPORATION, et al.,<br>Debtors. | CASE NOS.<br>84-01590-BKC-TCB<br>84-01591-BKC-TCB<br>84-01592-BKC-TCB<br>84-01593-BKC-TCB<br>84-01594-BKC-TCB |
| THE BANK OF NEW YORK, a New York banking corporation,<br>Plaintiff,<br>vs.<br>THEODORE B. GOULD, individually, as partner of CHOPIN ASSOCIATES, a Florida general partnership, and as a general partner of MIAMI CENTER LIMITED PARTNERSHIP, a Florida limited partnership; MIAMI CENTER CORPORATION, a Florida corporation, as partner of CHOPIN ASSOCIATES, and as general partner of MIAMI CENTER LIMITED PARTNERSHIP; and HOLYWELL CORPORATION, a Delaware corporation,<br>Defendants. | ADV.NO.<br>85-0160-BKC-TCB-A<br><br>JUDGMENT DETERMINING AMOUNT, VALIDITY, AND EXTENT OF LIENS OF THE BANK OF NEW YORK |

THIS CAUSE came to be heard on March 14, 1985 upon the Complaint of The Bank of New York (the "Bank") to determine the amount, validity, and extent of the Bank's mortgage liens. Having reviewed the pleadings and heard argument of counsel, it is hereby ORDERED and ADJUDGED that:

1. This Court has jurisdiction to hear and determine this cause pursuant to 28 U.S.C. §§ 157(B)(2)(K) and 1334, and has jurisdiction over the parties.

2. The Bank is a New York banking corporation located in New York, New York, and is a secured creditor of the Debtors as set forth in Proofs of Claim filed on December 20, 1984 in case numbers 84-01590-BKC-TCB, 84-01591-BKC-TCB, 84-01592-BKC-TCB, 84-01593-BKC-TCB and 84-01594-BKC-TCB.

3. Defendants, Theodore B. Gould ("Gould") and Miami Center Corporation, A Florida corporation ("MCC"), are the sole partners of defendant Chopin Associates, a Florida general partnership ("Chopin") and are the sole general partners of defendant Miami Center Limited Partnership, a Florida limited partnership ("MCLP").

4. Defendant, Holywell Corporation ("Holywell"), is a Delaware corporation with its principal place of business in Arlington, Virginia.

5. Gould, MCC, Chopin, MCLP and Holywell are the Debtors in the above-styled proceedings, having filed voluntary petitions in this Court under Chapter 11 of the Bankruptcy Code on August 22, 1984.

6. Chopin is the fee owner and MCLP is the ground lessee and the owner of all improvements and personal property on the real estate located in Miami, Dade County, Florida ("Miami Center Phase I"), as described in the loan documents attached to the Bank's Complaint in this action.

7. The due execution, delivery, recording, and authenticity of the notes, mortgages, and other loan documents is not in dispute.

8. The Bank advanced to the Debtors under the terms of the notes and mortgages the sum of $196,711,481.58, all of which is secured by the mortgages.

9. The Bank notified the Debtors by letter that the loans were in default at all times after January 31, 1984.

10. Accrued interest on the loans, determined by the Bank at the "contract" (good standing) rate, to March 14, 1985 is $33,103,184.24, and is secured by the Bank's mortgages. Based on a Prime Rate of 10.5% per annum, interest will accrue at $64,171.66 per day from March 14, 1985. Any change in the prime rate (whether up or down) will affect that daily interest figure.

11. Additional accrued interest on the loans, determined by the Bank, commenced February 1, 1984. That additional default interest of $4,528,077.11 is payable to March 14, 1985, and is secured by the loan documents. Based on a prime rate of 10.5% such default interest will accrue in the additional amount of $11,148.50 per day under the loan documents for each day from March 14, 1985 (for a total daily sum of $75,320.16). Any change in

the prime rate (whether up or down) will affect that daily interest figure.

12. The Bank claims additional amounts under the liens of the mortgages for pre-petition legal and loan expenses, totalling $831,563.72. The Court reserves ruling on whether all or some part of such legal and loan expenses should be added to the mortgage lien.

13. The lien of The Bank of New York in and to the Debtors' real and personal property identified in the loan documents as against the Debtors is superior to any other claim or interest of the Debtors in and to said real and personal property.

14. This Court will retain jurisdiction to grant such further relief as may be necessary and proper.

15. The Court finds and decides that the total lien of the Bank (including default interest from February 1, 1984) is $234,342,742.93 to March 14, 1985, plus per diem interest from March 14, 1985, at the rate of $75,320.16 per day.

16. This Final Judgment is subject to the Court's Order, dated March 20, 1985, respecting the scope of the 1983 and 1984 releases executed by the Debtors.

DONE and ORDERED in Chambers at Miami, Florida, this 20 day of March, 1985.

THOMAS C. BRITTON
UNITED STATES
BANKRUPTCY JUDGE

cc: S. Harvey Ziegler, Esq.
Vance E. Salter, Esq.
Fred H. Kent, Jr., Esq.
Irving M. Wolff, Esq.

## APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

| | |
|---|---|
| MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES, HOLYWELL CORPORATION, Appellants, v. BANK OF NEW YORK, Appellee. | Bk Nos. 84-01590-BKC-TCB 84-01591-BKC-TCB 84-01592-BKC-TCB 84-01593-BKC-TCB 84-01594-BKC-TCB No. 85-3225-Civ-Aronovitz |

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO GRANT PARTIAL STAY PENDING APPEAL AND TO DETERMINE APPROPRIATE SIZE OF SUPERSEDEAS BOND

Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould, Debtors in Possession (collectively referred to as the "Debtors"), file this Memorandum of Law in support of their motion for a partial stay pending appeal of the implementation or enforcement of the Amended Consolidated Plan of Reorganization, as modified by the Second Amendment to the Amended Plan (the "Plan") of the Bank of New York (the "Bank"), and for a determination that it is not necessary for Debtors to post a bond in excess of $30 million to obtain the stay. The Debtors originally moved for a stay pending appeal in the Bankruptcy Court. The Bankruptcy Court granted the motion for a stay, but required as a condition to the stay that Debtors post a bond of $140 million.

* * *

hotel and office building over the next year. *Id.* It presented no evidence to support this claim except to mention that Holywell had made $3 million in loans to the hotel, which was erroneously assumed to be for operating losses. Stay Transcript at 51, 54. Debtors explained that the $3 million loan that the hotel had was for capital improvements to the hotel, not operating losses. Stay Transcript at 95-96. See p. 6 *supra*.

The Bank added its figures up and came to $144 million, which the Bankruptcy Court essentially accepted without question since it set a bond of $140 million.

3. The Fallacies in the Bank's Calculations

It would be difficult to judge which of the figures cited by the Bank in its calculations is the most specious, in as much as each one is more fanciful than the next. One may begin by noting that $45 million of the sum – which is the total amount of undisputed claims *and* the disputed claims at full face value, plus interest – is damage that can easily be avoided, obviating the need for a bond. One of the Debtors, Holywell Corporation, is holding over $28 million in cash in bank deposits which have been frozen by the Bankruptcy Court and held as "cash collateral" for the Bank. Though this is "cash collateral" for the Bank, it is superfluous because the Bank is – and has consistently admitted it is – *over*secured by virtue of the current value of the hotel and office building alone. The Bank has no need whatsoever for the Holywell cash as security. There is no better evidence for this than the fact that *the Bank's Plan*

* * *

III. CONCLUSION

For the reasons set forth above, the Debtors respectfully request that the Court grant their motion for a partial stay pending appeal of the decision of the Bankruptcy Court confirming the Bank's Plan, to provide that the Debtors remain in possession and control of their property, that the Trustee may not assume possession and control of the Debtors' property and affairs; and to provide that they not be required to post a bond in excess of $30 million. Debtors further request that the stay without bond now in effect be continued for sufficient additional time to enable them to obtain such a bond. In the alternative, if this Court requires a bond in excess of $30 million, Debtors request that the stay without bond be continued for sufficient additional time so that they may appeal such decision to the United States Court of Appeals for the Eleventh Circuit.

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CASE NO. 90-1551

Supreme Court, U.S.
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OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,

*Debtors,*

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

*Petitioners,*

vs.

THE BANK OF NEW YORK AND FRED STANTON SMITH, INDIVIDUALLY AND AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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## ISSUES PRESENTED

I.

Does this court lack jurisdiction?

II.

Was the doctrine of mootness correctly applied by the lower courts to the facts of this case?

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## INTRODUCTION

This Petition marks the ninth time that these Petitioners have sought certiorari from this Court. The Petitioners have also previously filed a petition for writ of mandamus. With the exception of one petition that is currently pending before the Court,[1] this Court has denied all of the prior petitions.[2]

Like the petitions that have preceded it, there is nothing unique about this petition. On the contrary, the Petitioners have presented the same frivolous arguments to the bankruptcy court, the district court, and the United States Court of Appeals for the Eleventh Circuit. This Petition is particularly frivolous because it is a blatant attempt, notwithstanding a thinly-veiled attempt to appear otherwise, to reargue the identical issues raised in a prior petition which these Petitioners filed and from which this Court denied certiorari.[3] Moreover, this is not the first time that these Petitioners have sought to reargue these issues despite this Court's prior denial of certiorari.[4] It is thus apparent that the Petitioners have the same disregard for the decisions of this Court as they

---

[1] Case No. 90-1361. References to the Petitioners' Appendix will be denoted as "___ a," and references to the Appendix to this response are denoted "Bank's App. ___."

[2] Case Nos. 90-761, 90-676, 89-917, 89-864, 89-708, 88-80, 87-1989 and 87-1988.

[3] *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 1046 (1988) (Case No. 87-1988).

[4] *In re Holywell Corp.*, 901 F. 2d 931, 933 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 713 (1991) (Case No. 90-676).

have demonstrated time and time again in the courts below. The fact that new counsel are involved (the fifth firm of attorneys since the cases began) does not excuse that disregard.

## STATEMENT OF THE CASE

The Petitioners' statement is incomplete and contains numerous misstatements which need to be clarified or corrected.

The five affiliated debtors – Theodore Gould ("Gould"), Miami Center Limited Partnership ("MCLP"), Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin") all filed voluntary petitions in bankruptcy on August 22, 1984.[5] The bankruptcy cases initially were consolidated for joint administrative purposes, and the five debtor estates were later substantively consolidated by Order dated July 23, 1985.[6] Gould owned 100% of the stock of debtor, Holywell and also served as president and director of Holywell. In turn, Holywell owned 100% of the stock of debtor MCC, and Gould served as president and director of MCC. Gould and MCC were the sole general partners of debtor Chopin and of debtor MCLP. All five debtors were involved in developing the Miami Center

[5] For purposes of this Response, the Petitioners will also be referred to as the "debtors."

[6] Under the bankruptcy and equitable doctrine of "substantive consolidation," the assets and liabilities of related debtors are pooled, and inter-debtor obligations are eliminated.

Project, an office building and hotel complex in downtown Miami.

The Bank of New York (the "Bank")[7] was the lead construction lender for the Miami Center Project.

Commencing in March of 1980, the Bank advanced to the debtors in excess of $196 million under the terms of a series of notes, mortgages and other loan documents. The loans were in default as of February 1, 1984, and the Bank commenced a state court foreclosure action in July of

---

[7] Pursuant to Supreme Court Rule 29.1, the following is a listing of the relationships of The Bank of New York:

(a) Parent of the Bank - The Bank of New York Company, Inc.

(b) "Affiliates" of The Bank are:
BNY Holdings (Delaware) Corporation
The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.C.
Affinity Group Marketing, Inc.
ARCS Mortgage Corp. (Fla.)
ARCS Mortgage, Inc. (Calif.)
BNY Leasing, Inc.
Eastern Trust Company
The Bank of New York Life Insurance Co., Inc.
Capital Trust Company
BNY Financial Corporation
BNY Personal Brokerage, Inc.
Beacon Capital Management
The Bank of New York Trust Company, Inc.
The Bank of New York Trust Company of California
The Bank of New York Trust Company of Florida, N.A.
Leonard Newman Agency, L.P.

1984. The debtors filed voluntary Chapter 11 proceedings on August 22, 1984.

The relevant proceedings which led to this Petition are:

1. The Liquidating Trustee commenced the adversary proceeding below to resolve long-standing disputes regarding the October 10, 1985 sale of Miami Center. Under the confirmed plan of reorganization (the "Plan"), the land, improvements, furniture, fixtures, equipment, and other property comprising the Miami Center Project were sold to the Bank's designee for $255.6 million.

2. Although specifically noting that the Bank's Plan did not provide for the payment of taxes (Petition, pp. 5-7), the debtors fail to point out that the reorganization plans which they proposed and which were overwhelmingly rejected also did not provide for the payment of taxes.[8]

3. The contract for sale attached to the Plan (Exhibit "A" attached to C.P. No. 479)[9] provided for various prorations and adjustments that could affect the cash to

---

[8] Despite the fact that the tax issue is the subject of yet another petition currently pending before this Court (Case No. 90-1361) and despite the fact that this issue is not relevant to this Petition, the debtors argue at length the issue as to the payment of taxes. Petition, pp. 5-7, 13, 16, and 26-29. The debtors even devote one full section of their Petition to this issue. Petition, pp. 27-29. These arguments by the debtors are an improper attempt to get another bite at the apple.

[9] References to the record in the bankruptcy court are by bankruptcy court paper number after the abbreviation "C.P. No."

close. At closing on October 10, 1985, the Liquidating Trustee and the purchaser were unable to agree on a number of adjustments, and they agreed to finalize the adjustments after closing.

4. The debtors suggest that they had no voice as to the closing adjustments. Not so. The debtors, the Liquidating Trustee, and the Bank identified over 35 disputed adjustments.[10] All three interested groups prepared proposed closing statements reflecting their position on the adjustment items. By the Fall of 1987, when the Liquidating Trustee filed the adversary proceeding, many of the adjustments had been settled. One adjustment that was not settled was the debtors' claim, rejected by both the Liquidating Trustee and the Bank, that the Bank owed a "credit" in excess of $27 million for post-petition interest. Although the Plan provided clearly that such interest *was* to be allowed as a credit, and although the district court's prior opinion demonstrated clearly that the Bank was not "undersecured," the debtors refused to withdraw the claim.

5. The issue was presented to the bankruptcy court as Count III of the Complaint. The adversary proceeding was tried on December 8, 1987, and the bankruptcy court entered judgment in favor of the Bank on Count III by Order entered December 18, 1987. 11a.

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[10] The adjustment items included property tax prorations, credits for inventories of food and construction materials, credits for cash on hand in the hotel, and so forth.

6. Prior to the bankruptcy court's determination as to Count III, the extent, validity, and priority of the Bank's mortgage lien had been tried in another adversary proceeding on March 14, 1985. By judgment entered March 20, 1985, the bankruptcy court determined that the Bank's lien was valid and fixed the lien at over $234 million plus interest thereafter. *In re Holywell Corp.*, 49 Bankr. 694 (Bankr. S.D. Fla. 1985).[11]

7. The Bank's collateral included:

(a) The Miami Center Project, which the bankruptcy court determined was worth $255.6 million. The district court affirmed that finding in 1986. *Holywell Corp. v. The Bank of New York*, 59 Bankr. 340, 352 (S.D. Fla. 1986).

(b) Cash collateral in excess of $30 million, representing the proceeds of sale of three Washington, D.C. properties. Upon the Bank's motion, those proceeds became part of the Holywell and Gould estates, subject to a cash collateral order entered by the bankruptcy court on December 31, 1984. C.P. No. 303.

(c) The stock of various subsidiaries of the debtors.

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[11] The debtors appealed that judgment to the district court, and asserted in that appeal that interest was not correctly computed (Case No. 85-2263-CIV-Roettger). The district court dismissed that appeal. The Eleventh Circuit affirmed that dismissal and noted:

> [T]he debtors again attempt to tamper with the terms of the sale of the property. This would strike at a crucial element of the reorganization plan. . . . The debtors' efforts to again require the Bank to "sweeten the pot" after this principal transaction, the sale of the property, has been completed must fail.

*In re Holywell Corp.*, 901 F.2d at 934.

8. Thus, the Bank held collateral worth over $286 million as security for a judgment debt calculated pursuant to the Plan (under which the Bank waived a multi-million-dollar default interest differential of approximately $240 million as of the October 10, 1985 closing). *Miami Center Ltd. Partnership v. The Bank of New York*, 838 F.2d 1547, 1549 (11th Cir. 1988).

9. On a liquidation basis if the Plan had not been confirmed, the Bank might have become undersecured. The claim amount would have been over $250 million because of the default interest, while the "fire sale" value of the project would have dropped precipitously. The disclosure statement submitted by debtor Gould, for example, assigned a liquidation value of only $233.4 million to the land and buildings. C.P. No. 1188, paragraph 49(e).

10. The bankruptcy court confirmed the Bank's Plan by order entered August 8, 1985. *In re Holywell Corp.*, 54 Bankr. 41 (Bankr. S.D. Fla. 1985). The bankruptcy court modified that order by detailed findings of fact and conclusions of law entered after the district court remanded the debtors' appeal to the bankruptcy court for further hearings and the entry of specific findings and conclusions. *Holywell Corp.*, 59 Bankr. at 344. Those detailed findings, which were fully supported by the evidence below, included determinations that the post-petition interest in question was fully secured by the Bank's collateral. The district court affirmed the confirmation order as so amended, *Holywell Corp.*, 59 Bankr. at 352-53, and the Eleventh Circuit declined further review. *Miami Center*, 838 F.2d 1547.

11. Despite those above findings, the debtors point to two out-of-context statements which they contend

validate their argument that the Bank was undersecured. Petition, pp. 7, 9-10, and 13. First, the bankruptcy court's initial confirmation order (C.P. No. 906) included an introductory remark that described the Bank as, "the major creditor whose claim is undersecured and hopelessly in default." Because the remark was merely prefatory, there is no context from which the reader can discern: (a) whether the bankruptcy judge was commenting on a liquidation scenario or on the Bank's position under the Bank's or the debtors' proposed plans, or (b) *when* the Bank was or would be "undersecured" (i.e., on the petition date of August 22, 1984, the confirmation date of August 8, 1985 or otherwise). The bankruptcy judge's comment might have become correct in a liquidation context, because the Bank's claim would have been much greater (default interest would have been included) and the value of the project on a forced-sale basis would have been much less.

The debtors also point to statements made by counsel for the Bank during a motion for reconsideration of the Eleventh Circuit's order of remand (in Case No. 85-3225-Civ-Aronovitz) on January 10, 1986. Even from a cursory review of that transcript, it is clear that counsel for the Bank was talking about undersecurity (a) in the liquidation context (page 9, lines 18-22), (b) in the absence of a confirmed Plan rather than under the Plan (i.e., including default interest) (pages 9 and 10), and (c) as of January, 1986 rather than August or October, 1985. Bank's App. 6-8. It is evident that if confirmation of the Plan had been reversed in January, 1986 – *after* the Bank had invested $13.6 million in new cash, *after* the Bank had released its $30 million in cash collateral, and at a time when the

Bank's judgment lien (including interest at the higher default rate) had risen to $257 million – the Bank would have been undersecured. But that never occurred because the confirmation order was not reversed after the January 10, 1986 hearing. Instead the confirmation order was affirmed on March 20, 1986.

12. It is noteworthy that when it has suited the debtors to argue otherwise, they have taken a completely different position. In an attempt to minimize the amount of a supersedeas bond that the district court would require the debtors to post in order to obtain a stay pending appeal to the Eleventh Circuit, the debtors' prior counsel, who has since withdrawn, argued that, "the Bank is – and consistently admitted it is – oversecured by virtue of the current value of the hotel and office building alone." Bank's App. 11.

13. The Eleventh Circuit has noted that the Bank has performed its obligations under the Plan, and the debtors failed to obtain a stay pending appeal. As a result, the Eleventh Circuit concluded:

> The bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness, feasibility, and propriety had been verified, and that it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation.

*Miami Center*, 838 F.2d at 1557.

14. Based on the Eleventh Circuit's prior determination that it would not countenance the piecemeal dismantling of the Plan, the district court remanded the case to the bankruptcy court with directions to dismiss

Count III of the Liquidating Trustee's adversary complaint. 8-9a.

15. On appeal from that order, the Eleventh Circuit dismissed the debtors' appeal as moot, because "[t]his credit was part of the now substantially consummated plan of reorganization." In dismissing the debtors' appeal, the Eleventh Circuit noted that "[t]his appeal is one of a seemingly unending stream of appeals" that these debtors have filed. Although ultimately declining to do so, the court even went the additional and unusual step of considering whether to assess double costs and reasonable attorneys' fees for bringing a frivolous appeal. 2a.

## ARGUMENTS AGAINST GRANTING THE WRIT

The debtors turn a blind eye to adverse precedent and the law of the case. They reargue issues that this Court has already determined, and instead focus on issues that are irrelevant to this Petition but are currently pending before this Court in yet another petition. The debtors argue, at length, that the Eleventh Circuit erred in its application of the mootness doctrine. Yet, the court below did not modify its application of the mootness doctrine, but rather reaffirmed its prior decision in this same case. It is this prior decision with which the debtors take issue, not the decision rendered below. Unfortunately, however, this Court's denial of certiorari in that case precludes the debtors from again rearguing that

issue here. *Miami Center*, 838 F.2d 1547, *cert. denied*, 488 U.S. 1046 (1988).[12]

Similarly, the debtors have attempted to focus attention away from the issues at hand by addressing the issue of their liability for federal income taxes. The courts below have consistently and unanimously ruled against the debtors on this issue. Moreover, this tax issue is now pending before this Court (Case Nos. 90-1361 and 90-1484) in another petition. Consequently, there is no legitimate basis for the debtors arguing the tax issue in this Petition.[13]

## I.

## LACK OF JURISDICTION

### A. *The Petition is Moot*

The debtors are again clamoring for the return of something the Bank specifically bargained for in the Plan. This Court, however, previously denied the debtors' petition for writ of certiorari on the mootness issue sought to

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[12] This is not the first time that the debtors have exhibited a flagrant disregard for this Court's decisions. *See* Case No. 90-676. Principles of res judicata, collateral estoppel and the law of the case clearly bar this repeated relitigation of this issue. *Arizona v. California*, 460 U.S. 605, 618 (1983); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979)

[13] This is particularly true in view of the debtors' failure or refusal to obey the three lower court rulings requiring them to file federal income tax returns and pay their taxes (if any such taxes are due).

be reviewed again in this Petition. *Miami Center Ltd. Partnership v. Bank of New York*, 488 U.S. 1046 (1988).[14]

The debtors argue as they did previously that the Eleventh Circuit misapplied the mootness standard. This Court, however, denied certiorari jurisdiction after considering that argument. *Id.* The debtors' failure to obtain a stay pending review of the confirmation order rendered moot any objections to the provision in the Plan that provided for the payment of post-petition interest, because those calculations were a material element of the confirmed plan of reorganization. This Court[15] and the

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[14] This Court has consistently denied certiorari jurisdiction where the court below held that the action, in whole or in part, was moot. *See, e.g., United States v. Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n*, 871 F.2d 401 (3d Cir.), *cert. denied*, 110 S. Ct. 363 (1989); *Railway Labor Executives Ass'n v. Hotel Employees and Restaurant Employees Internat'l Union*, 915 F.2d (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991); *Cotton v. Mansour*, 863 F.2d 1241 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 835 (1990); *Folkstone Maritime, Ltd. v. CSX Corp.*, 866 F.2d 955 (7th Cir.), *cert. denied*, 110 S. Ct. 60 (1989); *Tyler v. Black*, 865 F.2d 181 (8th Cir.), *cert. denied*, 109 S. Ct. 1760 (1989); *Spears v. Thigpen*, 846 F.2d 1327 (11th Cir. 1988), *cert. denied*, 488 U.S. 1046 (1989); *Columbia Gas Transmission Corp. v. F.E.R.C.*, 895 F.2d 791 (D.C. Cir.), *cert. denied*, 111 S. Ct. 278 and 111 S. Ct. 279 (1990); *SunTek Indus., Inc. v. Kennedy Sky Lites, Inc.*, 848 F.2d 179 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

[15] This Court regularly denies review of mootness determinations because they, "require a case-by-case judgment regarding the feasibility or futility of effective relief." *In re AOV Indus., Inc.*, 792 F.2d 1140, 1147-48 (D.C. Cir. 1986). This Court articulated the mootness standard that controls the instant case nearly a century ago. *Mills v. Green*, 159 U.S. 651, 653 (1895). The rule is just as vital today.

federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders an appeal moot after a plan has been substantially consummated. *In re AOV Indus., Inc.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981). "In this situation the mootness doctrine promotes an important policy of bankruptcy law – that court-approved reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues, Inc.*, 662 F.2d 475, 477 (8th Cir. 1981). Moreover, the implementation of a confirmed plan irrevocably changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

B. *The Debtors Have Failed To Establish An Appropriate Basis For This Court's Certiorari Jurisdiction*

The debtors argue that this Court has jurisdiction by virtue of the existence of a conflict between the Eleventh Circuit and several of the other courts of appeal as to the appropriate mootness standard. Notwithstanding the debtors' far reaching attempts to manufacture a basis for this Court's jurisdiction, it is apparent (as outlined in more detail below) that there is no conflict or important question of federal law to be resolved by this Court. Sup. Ct. R. 10.1. Any conflict that exists is with the Eleventh Circuit's prior opinion (838 F.2d 1547) and not with the opinion below. This Court, however, already determined

that there was no basis for jurisdiction in that case. 488 U.S. 1046.

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## II.

## THE COURT OF APPEALS CORRECTLY APPLIED THE MOOTNESS DOCTRINE

The debtors have focused their attack on the mootness standard set forth in *Miami Center*, 838 F.2d 1547 (1988). The debtors raise the same arguments in this Petition that they raised unsuccessfully in their earlier petition. Accordingly, for the same reasons that this Court previously denied the debtors' prior petition for writ of certiorari, this Court should again deny this Petition.

The application of the mootness doctrine in a given case is particularly fact-driven. Individual decisions turn on the specific details of the confirmed plan of reorganization, the degree to which that plan has been implemented, the positions of the various parties to the proceedings, and the ability of a court to fashion "effective relief." This Court does not grant certiorari to review evidentiary matters, particularly where two courts below have concurred in the findings of facts. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *see also United States v. Johnston*, 268 U.S. 220, 227 (1925) (the Supreme Court does not grant certiorari to review evidence and discuss specific facts).

The Eleventh Circuit in the prior decision with which these debtors again take issue noted that the district court had made:

> [D]etailed findings that the plan was fair, feasible, and that it had been substantially consummated. And it included the finding that it was *legally and practically impossible to unwind the confirmation of the plan or otherwise restore the status quo.*

*Id.* at 1554 (emphasis added). All of the administrative claims have been paid or reserved; secured claims have been paid in full; class 3 claims have been paid in full; undisputed claims in classes 4 through 6 have been paid in full and funds reserved for disputed claims; several disputed claims have been compromised; and there remain sufficient funds for the satisfaction, in full or in part, of the debtors' claims. *Id.* at 1552. Further, the Miami Center Project was sold over five years ago to the Bank's designee and is now under new ownership. Pursuant to the Plan, the Bank advanced millions of dollars in new cash above the mortgage balance, and the Bank released to the Liquidating Trustee over $30 million in cash collateral. That money has since been used to pay hundreds of creditors, who would not willingly disgorge the amounts received.

The prior opinion of the Eleventh Circuit and the opinion from which review is now sought are totally consistent with the long line of precedent requiring Article III Courts to decide actual controversies by a judgment which can be carried into effect, and not to give advisory opinions on moot questions. *Mills*, 159 U.S. at 653. Accordingly, this Court and the federal circuits have consistently and uniformly held that a debtor's failure to obtain a stay pending appeal renders an appeal moot after a plan of reorganization has been substantially implemented. "In this situation, the mootness doctrine

promotes an important policy of bankruptcy law – that court-appointed reorganizations be able to go forward in reliance on such approval unless a stay has been obtained." *In re Information Dialogues*, 662 F.2d at 477. Moreover, the Ninth Circuit Court of Appeals in *Roberts Farms* opined that "[i]n the field of the administration of estates under the bankruptcy laws, the policy of the law strongly supports a requirement that a stay be obtained if review on appeal is not to be foreclosed because of mootness." 652 F.2d at 796. The implementation of a confirmed plan forever changes the positions and rights of the parties. It is these changes in circumstances and the creditors' reliance on a confirmed plan that make it impossible to fashion a remedy that would restore the interested parties to their former positions.

In light of this general rule and the underlying policy in favor of finality, the debtors (as they did previously in their petition in Case No. 87-1988) have again strained to create a conflict among the circuits or a conflict between the decision of the Eleventh Circuit and the decision of this Court. The decision below, however, is wholly consistent with the decisions of this Court and of other federal circuits. There is one harmonious theme throughout the opinions of this Court, the Eleventh Circuit, and the other federal circuits – where it is impossible to fashion a remedy that would restore the interested parties to their former positions, it is inequitable to consider the merits of the appeal.

Despite the fact that the opinion below makes no reference to Section 363(m) of the Bankruptcy Code, the debtors devoted over three pages of their argument to the applicability of this section. Petition, pp. 17-20. Likewise,

the debtors' citation of *In re Joshua Slocum Ltd.*, 922 F.2d 1081 (3d. Cir. 1990) is also inapplicable. The court in *Slocum* clearly distinguished the facts in that case from the situation where *"during the pendency of the appeal,* events occurred preventing the appellate court from granting effective relief." *Id.* at 1085 (emphasis in original). The debtors inexplicably place their reliance on the dissent's citation in *Slocum* of the decision in *Miami Center,* 838 F.2d 1547. The majority, however, did not even cite the *Miami Center* decision or otherwise hint that its decision conflicted with the *Miami Center* decision. Contrary to the debtors' assertion, the Third Circuit did not decline to expand the "mootness doctrine," but merely refused to do so based on the facts in the *Slocum* case. Petition, pp. 23-24.[16]

The debtors' argument that decisions rendered by the D.C. Circuit, the Ninth Circuit, and the Sixth Circuit[17]

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[16] On the other hand, at least one district court in the Third Circuit has cited with approval the *Miami Center* case and its application of the mootness doctrine. *In re Quality Spice Corp.*, 107 Bankr. 843, 849 (D. N.J. 1989).

[17] The decisions cited by the debtors to support this contention that a conflict exists are: *In re AOV Indus.*, 792 F.2d 1140 (D.C. Cir. 1986); *In re Roberts Farms*, 652 F.2d 793 (9th Cir. 1981); *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977); and *Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449 (6th Cir. 1982). The debtors also cite in their statement of the case (Petition, p. 14) the Eleventh Circuit's decision in *Markstein v. Massey Associates, Ltd.*, 763 F.2d 1325 (11th Cir. 1985) as standing for the proposition that issues as to closing adjustments are not mooted by consummation of the sale. In this case, however, the confirmed Plan permitted no adjustment for interest; interest was fixed by a final judgment as to which all appeals (including a petition for certiorari) have been exhausted.

somehow conflict with the Eleventh Circuit is equally without merit. The debtors overlook the fact that the Eleventh Circuit in the *Miami Center* case cited the decisions in *AOV*, *Roberts Farms*, and *Combined Metals* in analyzing the factors to be considered in determining whether an appeal is moot. *Miami Center*, 838 F.2d at 1555. Moreover, this is not the first time that the debtors have argued that the decisions in *AOV* and *Combined Metals* are in conflict with the decisions of the Eleventh Circuit. They made the same argument in the *Miami Center* case, but the Bank demonstrated in its brief in opposition that these decisions as well as the *Roberts Farms* decision are consistent with the decisions of the Eleventh Circuit. *See* Bank's Brief in Opposition, pp. 16-18 (Case No. 87-1988).

The only new case upon which the debtors now rely is the Sixth Circuit's decision in *Madeline*. The court in *Madeline*, however, expressly noted that it did not even reach the issue as to whether it is possible to fashion a remedy that would restore the interested parties to their former positions. *Madeline*, 694 F.2d at 464.

This Court has acted consistently to limit and control the burgeoning workload of the federal court system. The mootness doctrine in bankruptcy cases is a significant element of that effort. Bankruptcy decisions already enjoy a second level of appellate review in the federal system. For the sake of creditors, the litigants, and the federal system, a confirmed bankruptcy plan of reorganization must not be kept under an appellate sword of Damocles for the entire duration of the appellate process. When debtors fail to post a bond as required, the parties should be allowed to consummate the plan and change positions in reliance upon the law of that case at that time.

To hold otherwise, as the debtors apparently urge, is to paralyze the ability of the bankruptcy courts to oversee and conclude reorganization cases.

## CONCLUSION

For all the foregoing reasons, this Court should deny the debtors' petition for writ of certiorari.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of May, 1991, a true and correct copy of the foregoing was mailed by first class, postage paid, U.S. mail to:

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No. 90-1551

In The

# Supreme Court of the United States

October Term, 1990

IN RE: HOLYWELL CORPORATION, et al.,

*Debtors,*

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

*Petitioners,*

*vs.*

THE BANK OF NEW YORK AND FRED STANTON SMITH, INDIVIDUALLY AND AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## APPENDIX TO BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

| | | |
|---|---|---|
| HOLLYWELL [sic] CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE B. GOULD, | : | Case No. 85-3225-Aronovitz-Civil |
| Appellants, | : | Miami, Florida Friday, January 10, 1986 9:30 a.m. |
| vs | : | |
| THE BANK OF NEW YORK, | : | |
| Appellees. | : | |

TRANSCRIPT OF HEARING HELD BEFORE
JUDGE SIDNEY M. ARONOVITZ

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Reported By:

NANCY BRYANT

* * *

[p. 5] up these matters which directly involve the appellants, the appellee, and the Liquidating Trustee.

Now, since these are primarily motions from the side of the appellee, I will now recognize counsel for appellee to address those several motions first in argument.

MR. BERGAN: May I interrupt for just a moment before you do that?

THE COURT: Yes, sir.

MR. BERGAN: If the Court please, perhaps I can make this a tiny bit shorter. We filed an opposition to the

bank's motion for clarification. I think it's not really an opposition.

If what the bank is seeking in that motion is a statement by this Court that the confirmation order has not been stayed during the period of remand, we don't oppose that. If that is what they are looking for. I thought if I said that preliminarily, it might save some discussion.

THE COURT: Thank you, sir.

All right, Mr. Salter.

MR. SALTER: Your Honor, obviously, what brought us here is concern over two points. The first is a factual point. Your Honor's order recited that we paid for the Miami Center project by cancelling our lien or satisfying it, and adding to that for the cash to close money that came from the cash collateral, the sum of about $30 million that had been set [p. 6] aside pursuant to an order designating it as cash collateral, had been set aside from the sale of Mr. Gould's Washington property. So in the first instance, that was money that had been realized by the debtors, and there we had a security interest in it.

What happened, in fact, was that the bank put in new money and we disbursed the cash to close in new cash to this project, $13.6 million in cash and liabilities that was injected to accomplish that closing.

So I wanted to make very certain that the Court understood that, because there were really two actions, and that is part of our position that the sale, indeed, is irreversible. So that there were actually two things that happened.

We injected $13.6 million in new cash, and we released the money that was our cash collateral of $30 million to the Liquidating Trustee for the payment of claims, a total of $43.6 million.

I would also point out, Your Honor, that in the order of confirmation, I do understand Your Honor's concerns about the order of confirmation and the need for additional findings. We'd move to proceed forward with that with all due speed Tuesday in the Bankruptcy Court.

But in that confirmation order, there was indeed a finding – it's right in the preamble to the first page of that [p. 7] confirmation order – it says that the loans are hopelessly in default, and the bank is undersecured.

And I think the question would arise in your mind, well, how can the bank be undersecured if it's got a lien that it says is approximately $242 million, a building that it says is worth $255.6 million –

THE COURT: Where are you reading from?

MR. SALTER: Page 1 of the confirmation order.

THE COURT: Oh, of the confirmation order.

MR. SALTER: Yes, sir.

THE COURT: I thought you were referring to the order of remand.

MR. SALTER: No, sir, the confirmation order below.

THE COURT: Go ahead.

MR. SALTER: I preceded that with a statement. We do understand your concerns about it, but there is a

statement right in it that "the Bank of New York, the major creditor, whose claim is undersecured and hopelessly in default."

THE COURT: I don't think anyone questioned the fact it was in default.

MR. SALTER: Okay. I say that, Your Honor, also because of the undersecurity point, and that is critical to our position.

And this goes to the second point that Your Honor found; the finding in your order that the sale could be unwound [p. 8] and the parties restored fairly to their starting positions.

We want Your Honor to understand that the bank here is in a position of having bargained for something in its plan; that is, good title to the Miami Center project. That is in the contract. That has played a part of the plan. And we are now being told that we may not have good title, that there is some question about that.

If that is indeed the case, if the title we have is revocable in some fashion, then we have not gotten what we paid for. And the reason we ask for the emergency motion and the time, that we very much appreciate your granting the time, is our concern that our purchase money is being dissipated, and our cash collateral, which was our protection for this enormous interest accrual that was occurring right as we went along in the Bankruptcy Court, and would be going on now were we to be restored.

THE COURT: Well, let me ask you this. My recollection is that the bank maintains that the property, at

appraised value, is worth $255,700,000. and in addition to that, there is a $30 million cash collateral from the sale of the affiliated companies, Washington, D.C. real estate.

So, have you taken all that into account when you said –

MR. SALTER: Yes, sir.

THE COURT: – when you say the bank is undersecured?

[p. 9] MR. SALTER: Yes, indeed. And the problem here arises in several respects. One is, as Your Honor knows, tax liens take priority over mortgage liens, judgment liens. So, there are – Mr. Gould did not pay his taxes, and there were about $10 million of tax claims. There was extensive tax litigation by the City of Miami against the property. There are about $10 million in claims that push us back on that property.

So, in reality, it's not a $255.6 million equity or value that we are looking at. It has to be reduced by the amount or the unpaid taxes.

In addition, there are contingencies with the City of Miami. There is the River Walk, there are the development questions that must be resolved. So, there are an awful lot of costs yet to go and uncertainties relating to that property that have to be assumed. So, it is not at all safe – it's not at all safe to say that that property is, boy, just as good as gold, $255.6 million.

I would also remind Your Honor that in their liquidation analysis, attached to their plans, they said that the liquidation value, in Appendix 23 to our agreement –

they said that the liquidation value of those properties is about $233 million, the property and land.

But I think the principal point is that when you take the bank's lien from the Bankruptcy Court judgment, and you take it at its default rate, because it was in default – that [p. 10] has been admitted, and that is what is in the judgment – on October 10th, that lien would have been about $257 million – excuse me, it's 257 now. On October 10th, it would have been $249 million.

Part of the plan was to waive that default interest, and reduce the lien to the contract rate of interest, or about $242 million. We then put in new cash to close above that, $13.6 million of new money.

Now, if it is the case that the money that we put in in our cash collateral, which is the protection for our lien – if it is the case that we can be restored to that position, and divested of title to what we paid for it, we certainly want to move quickly to get the Liquidating Trustee, number one, to stop paying anyone else with our money and our cash collateral, and number two, to get back whatever he has paid to date.

In addition, we have some business decisions that I think will have to be made: Can we do anything with that property? Can we enter into a management contract? Can we enter into leases with new tenants? Can we continue to try to upgrade the hotel to get a lease by Intercontinental Hotels Corporation? Can we try to turn the project around?

That is, of course, what banks try to do when they take property back. They take it back, attempt to get it

leased out, income producing, then to dispose of it. They are not in the realty business generally; try awfully hard not to be.

[p. 11] If we can't do that, then I think we have a serious problem, and we want to take very drastic measures very quickly to try to reverse the process of seeing our money go out the door to creditors who are not before this Court.

The second part of our motion, Your Honor, is to clarify that fact and make sure that you understand this position with new money, that money did come in and has gone out, is in the hands of the Liquidating Trustee. The Liquidating Trustee can perhaps address this better, but my understanding is that about 250 checks have been cut, and that money has, in substance, been paid, an awful lot of it.

But the second point that we wanted to make, Your Honor, was to, in light of this, in light of these facts, ask Your Honor to revisit the in re Sewanee Land, Coal and Cattle Case, the Eleventh Circuit case, because of its finding that really, if the bank is a good faith purchaser, the rule of 363 M, or former rule 805 – but the principle of mootness does apply.

In light of that fact, in light of the fact that this money is out – this money is out, can't be recovered, cash collateral is dissipating ever more quickly, how can we be restored to our position? And if that is the case, then we would respectfully submit, Sewanee really requires dismissal of that case.

Final point, and if it's acceptable to counsel and to [p. 12] Your Honor, I will keep five minutes for Mr. Ziegler –

THE COURT: Go ahead. Take whatever time you reasonably need. I have the morning set aside, if need be.

MR. SALTER: I appreciate that.

THE COURT: Go ahead.

MR. SALTER: But the second point, and really our reason for asking for certification, something that is a little unusual under the interlocutory appeal rule, is that if, indeed, this case is moot, and if, indeed, Sewanee does apply – and, of course, the Eleventh Circuit, the Circuit to which we would be headed, is the court that entered that decision – then why should we not, in the interest of getting an ultimate resolution of this thing, go ahead and take that limited question up now?

I understand their opposition to it, but I don't think that the scheme of an interlocutory appeal is to in any way delay this appeal or the remand proceeding. I believe that they can continue at the same time on that limited interlocutory appeal.

What we are trying to avoid, Your Honor, very simply, is what happened to Belgium in World War I, or Seoul, Korea, during the Korean War; that is, one side comes through the hotel and takes title, the other side comes through the hotel and takes title. The employees are already uncertain about what is happening because of the newspaper clips that they saw,

* * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

| | | |
|---|---|---|
| MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, THEODORE B. GOULD, CHOPIN ASSOCIATES, HOLYWELL CORPORATION, | ) | Bk Nos. 84-01590-BKC-TCB 84-01591-BKC-TCB 84-01592-BKC-TCB 84-01593-BKC-TCB 84-01594-BKC-TCB |
| Appellants, | ) | No. _____ |
| v. | ) | |
| BANK OF NEW YORK, | ) | |
| Appellee. | ) | |

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO GRANT PARTIAL STAY PENDING APPEAL AND TO DETERMINE APPROPRIATE SIZE OF SUPERSEDEAS BOND

Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould, Debtors in Possession (collectively referred to as the "Debtors"), file this Memorandum of Law in support of their motion for a partial stay pending appeal of the implementation or enforcement of the Amended Consolidated Plan of Reorganization, as modified by the Second Amendment to the Amended Plan (the "Plan") of the Bank of new York (the "Bank"), and for a determination that it is not necessary for Debtors to post a bond in excess of $30 million to obtain the stay. The Debtors originally moved for a stay pending appeal in the Bankruptcy Court. The Bankruptcy Court granted the motion for a stay, but required as a condition to the stay that Debtors post a bond of $140 million.

* * *

hotel and office building over the next year. *Id.* It presented no evidence to support this claim except to mention that Holywell had made $3 million in loans to the hotel, which was erroneously assumed to be for operating losses. Stay Transcript at 51, 54. Debtors explained that the $3 million loan that the hotel had was for capital improvements to the hotel, not operating losses. Stay Transcript at 95-96. See p. 6 *supra*.

The Bank added its figures up and came to $144 million, which the Bankruptcy Court essentially accepted without question since it set a bond of $140 million.

3. The Fallacies in the Bank's Calculations

It would be difficult to judge which of the figures cited by the Bank in its calculations is the most specious, in as much as each one is more fanciful than the next. One may begin by noting that $45 million of the sum – which is the total amount of undisputed claims *and* the disputed claims at full face value, plus interest – is damage that can easily be avoided, obviating the need for a bond. One of the Debtors, Holywell Corporation, is holding over $29 million in cash in bank deposits which have been frozen by the Bankruptcy Court and held as "cash collateral" for the Bank. Though this is "cash collateral" for the Bank, it is superfluous because the Bank is – and has consistently admitted it is – *over*secured by virtue of the current value of the hotel and office building alone. The Bank has no need whatsoever for the Holywell cash as security. There is no better evidence for this than the

fact that *the Bank's Plan* proposes to use *that very cash* to pay the creditor claims other than the Bank's. Nonetheless when the Debtors proposed to do the same thing – use the Holywell cash to pay the undisputed claims now and remove the trade creditors from any harm that delay might occasion – the Bank protested that the Holywell cash was its "collateral." It is noteworthy that the Bank did not – because it could not given its oversecured position and its own Plan – claim that it would be harmed by use of the Holywell cash. The $45 million dollar loss to creditors is a creation entirely of the Bank and its obstructionist position that the Holywell cash can be used to pay creditors only when and how it says but not when to do so would not harm the Bank but might provide a means by which Debtors' right to an appeal and undisputed claim holders' interests can be protected.[18]

The $61 million claim for deterioration in the value of the Miami Center is equally without foundation. First of all, the assertion flies in the face of the Bank's own Plan. It strains credulity for the Bank to argue that it is offering to pay $255.6 million – $16 million more than its claim – for a hotel and office complex that it has no immediate prospects of selling and that it believes will be worth only $194.6 million in a year ($255.6 million less $61 million). The entire board of directors of the Bank of New York

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[18] The Bank has consistently in the bankruptcy case used a not very subtle form of bullying on the Bankruptcy Court, and it repeated the tactic in the hearing on a stay. The Bank made it clear that if the Plan could not go forward and the Miami Center was not conveyed promptly to the Bank – in other words if the Bankruptcy Court granted a meaningful stay – the Bank would withdraw its Plan. Stay Transcript at 43-44.

would be sacked – and rightfully so – if that is really what the Bank expects to be buying. And indeed experience shows that the Bank's judgment is much more prudent than that.

The Debtors commissioned two appraisals of the Miami Center, one as of August, 1983 and another as of October, 1984. Both were done by McCune & Company. The August, 1983 appraisal for the land, hotel, Podium, parking garage, office building and FF&E was $285 million. The October, 1984 appraisal for the same items was $275 million. This is an annual rate of decline for the entire Miami Center of approximately $8.5 million. The Bank offered nothing that would support a conclusion that conditions in 1985 and 1986 will be so much different from those that prevailed in 1983 and 1984.

It is far more likely that the Bank is paying $255.6 million because it expects to recoup its claim, and indeed profit in the bargain. The absurdity of the Bank's calculations are best illustrated by two critical elements of its counsel's analysis. With absolutely no factual basis except the Bankruptcy Court's "judical notice" of the state of the Miami office market, the Bank baldly guessed that the office building would decline 20% in value over the next year. It then applied this percentage against a value of $240 million for the office building, which is $128.2 million more than the Bank's own appraisal of the office building. Though the Bank claimed this was "Mr. Gould's appraisal" of the office building, Stay Transcript at 55, it was nothing of the sort. There is no appraisal in the record that gives such a value to the office building. The $240 million figure is close to the number given by Debtors' appraiser, McCune & Company, in its October,

1984 appraisal, for the office building *and the hotel, the parking garage, and the restaurant and shopping mall Podium* together. In other words, the Bank was double-counting when it added $48 million to $13 million. This is again a good example of the looseness and lack of concern for accuracy with which the Bank tossed off valuation and damage estimates.

It is respectfully suggested that if the Bankruptcy Court gave such credence in this instance to the Bank's valuation of the office building and hotel – which total $305 million – it should have rejected as grossly inadequate the Bank's Plan which proposes to buy the office building *and* the hotel *and* all the furniture, fixtures and equipment in both *and* the underlying land for only $255.6 million, or $49 million less than the figure the Bank used for the hotel and office building alone in deriving its "damage" calculations.

4. The Actual Reasonably Anticipated Losses

It is respectfully submitted that if the Bankruptcy Court had returned to solid ground after the fanciful flights in the Bank's argument, it could have fashioned a stay that would protect the Bank, protect non-Bank claimants, and be conditioned on a bond within the means of the Debtors.

* * *

No. 90-1551

Supreme Court, U.S.
FILED
MAY 20 1991
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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HOLYWELL CORPORATION, *et al.*,
*Petitioners,*

v.

BANK OF NEW YORK and
FRED STANTON SMITH,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## REPLY BRIEF FOR THE PETITIONERS

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APPENDIX

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## REPLY BRIEF FOR THE PETITIONERS

1. *This Case Emerges from the Same Scheme as that Revealed in the Tax Case.*—In its brief opposing certiorari on our petition and that of the United States in Nos. 90-1361 and 90-1484 (the "tax case"), the Bank of New York ("Bank" or "BNY") admitted—indeed appears to have boasted—that the purpose and intent of its Plan of Reorganization was the avoidance of taxes. The Bank's purpose was to be fulfilled by the appointment of a trustee with powers similar to those of an ordinary bankruptcy trustee—to act under court supervision, to give bond, to sue and be sued, to deal with the trust assets in any lawful manner—but who (unlike any other kind of trustee of insolvent estates) was not to pay federal income taxes. Indeed, the Bank's brief in opposition to certiorari in the tax case indicated that this was one of the primary purposes of the Plan and, if the Plan were not so construed, its fundamental purpose would be frustrated. BNY Br. (Nos. 1361, 1484) 3, 9, 14-16, 27. The trustee put it even more strongly, asserting that the Plan "does not *permit* payment of the taxes." Smith Br. (Nos. 1361, 1484) 8 (emphasis added).

The present case involves an unlawful provision in the Plan under which the Bank's claim for postpetition interest—despite the Bank's status as an undersecured creditor—is to take precedence over the claims of all other creditors, including that of the United States for federal income taxes, since the trustee was not going to pay taxes at all. The respondents here take the position that the bankruptcy doctrine of "mootness" insulates this unlawful provision of the Plan from any judicial scrutiny. They urged this, too, as a reason for not granting certiorari in the tax case—namely that the Plan meant and intended that taxes not be paid and that it was too late to question this. BNY Br. (Nos. 1361, 1484) 15-16; Smith Br. (Nos. 1361, 1484) 17-18. Here, they make this "mootness" argument on the ground that the Plan was

consummated through the sale of the Miami Center project to the Bank's nominee at a time when the present petitioners were protesting the unlawful provision in the Plan but, like most bankruptcy debtors, did not happen to have $50 million to put up a bond to stay the consummation of the Plan.[1]

Thus, the United States (not a party to this case) observed in its Reply Brief in the tax case that the "question whether this bankruptcy concept of 'mootness' should be applied to foreclose appellate review of objections to a plan that were made before confirmation is currently pending on petition for a writ of certiorari in *Holywell* v. *Bank of New York*, No. 90-1551 (filed Apr. 8, 1991)." Reply Br. (No. 1484) 7 n.8.

It appears clear that the two aspects of the Plan—(1) the trustee's and the Bank's position that neither the Plan nor the law requires—indeed permits—the trustee to pay federal income taxes, and (2) the express provision of the Plan that the Bank's unsecured claim for postpetition interest is to be paid as if it were secured—are part of the same scheme. If we and the United States prevail in the tax case, a denial of review of the judgment in this case would mean that instead of the Government's claim for taxes coming first (either as an administrative expense under 11 U.S.C. §§ 503(b)(1)(B) and 507(a)(1) if the trusteeship is viewed as part of the bankruptcy case, or under 31 U.S.C. § 3713(a) if it is viewed as something separate from the bankruptcy case), the $27 million in postpetition interest the Bank received will take precedence as a secured claim over the claim for taxes.

The limited assets in the Trust currently amount to about $25 million. Taxes for just one year, with penal-

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[1] A difference between this case and the tax case is, of course, that in the tax case the Court of Appeals for the Eleventh Circuit held that the mootness doctrine was not applicable. Pet. App. (No. 1361) 7a; 911 F.2d at 1544. In this case, without discussion, the court of appeals reached the opposite conclusion. Pet. App. 2a.

ties and interest, relating to Holywell, are estimated by the IRS to exceed $33 million. Reply Br. (No. 1484) 7 n.7. Therefore, effective relief will not be available out of the Trust's assets unless the postpetition interest taken by the Bank is restored. At the same time it is (as the trustee concedes) "curious[]" (Smith Br. 7) that the Bank recovered every penny of principal, prepetition interest and postpetition interest, though "undersecured" and "fac[ing] a substantial loss." Pet. App. 12a, 15a.[2]

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[2] A recent decision by District Judge Ryskamp in *In re Holywell Corp. (United States* v. *Bank of New York)*, No. 91-0953-CIV-RYSKAMP (S.D. Fla. May 16, 1991) (App. hereto), shows another device, like the postpetition interest credit, that the Bank is attempting to use to exhaust the assets of the Liquidating Trust and prevent them from being available for the payment of taxes should we and the United States prevail in the tax case. Without notice or hearing (App. 3a), the Plan of Reorganization was amended to provide for the issuance of a Trustee's Certificate to the Bank in the event that certain elements of the Bank's Plan were reversed and, as a result, the trustee requested a loan from the Bank. Although the reversal occurred (because these elements of the Plan did not meet the fair and equitable standard), *see In re Holywell Corp. (Olympia & York Fla. Equity Corp.* v. *Bank of New York)*, 913 F.2d 873, 879-81 (11th Cir. 1990), no such loan was ever made. Instead, the Eleventh Circuit required the Bank to pay the unfairly treated creditor directly. Nonetheless, by order entered May 2, 1991, the bankruptcy judge granted the Bank's motion for the issuance of a Trustee's Certificate in the amount of $22,128,484—without "any findings of fact or . . . any legal analysis" (App. 4a). (The same bankruptcy judge's conclusion that is the subject of the present petition—that the Bank was not undersecured—was also unaccompanied by any findings of fact or conclusions of law (Pet. App. 11a).) The Trustee's Certificate was interpreted by the Bank and the trustee to be paramount in right of payment to all other claims against the liquidating trust, including tax claims.

Judge Ryskamp granted a stay of the bankruptcy court's order. He viewed the bankruptcy court's confirmation of the Bank's amendment without notice or a hearing to be "a matter of serious concern," App. 3a; and he responded to our and the United States' contention that if the Trustee's Certificate is issued the "United States will be unable to collect taxes due to the depletion of funds held by the trustee," by concluding that "the potential damage to

The two cases—the tax case and the present petition—both relate to parts of the same scheme, according to the Bank's own admissions. That scheme is and was an unlawful scheme. It seems to be only the fact that the Bank concealed its intent about the taxes from the court of appeals that caused that court to apply the mootness doctrine to the present case and not to the tax case as well.

2. *This Court has Jurisdiction to Review.*—Respondents mistakenly contend that the court of appeals' use of the word "moot" in its refusal to adjudicate the merits of this case strips this Court of jurisdiction. Smith Br. 19-20; BNY Br. 11-14. That mistake stems from their confusion of two fundamental and distinct concepts that shape the jurisdiction of the federal courts: Article III's preclusion of adjudication where there is no longer a live "Case[]" or "Controvers[y]" between the parties; and Congress' powers to legislate substantively on bankruptcy matters (Article I) and to control the jurisdiction of the courts (also Article III). The former concept (constitutional mootness) is not involved in this case: nothing has occurred that has eliminated the dispute between the litigants in this Court or otherwise made adjudication of this dispute inconsistent with the adversarial process. *Compare, e.g., Deakins* v. *Monaghan*, 484 U.S. 93, 199-201 (1988); *Golden* v. *Zwickler*, 394 U.S. 103, 108-09 (1969). Instead, it is the Eleventh Circuit's common-law expansion of the latter concept (congressional control of substantive bankruptcy law and federal court jurisdiction)[3] that is at issue here. *See* Pet. 15. The fact that the court of appeals has refused to adjudicate this dispute—for policy reasons alone—

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the United States is severe and likely irreparable." App. 4a. We submit that similar considerations are applicable to this Court's consideration of the petition in the present case.

[3] The statutory provision is section 363(m) of the Bankruptcy Code, 11 U.S.C. § 363(m) (Pet. 3), which expressly provides that (without a stay) reversal on appeal does not affect the validity of certain sales of property approved by the bankruptcy court.

does not deprive this Court of jurisdiction should it decide to exercise it to review that refusal.

3. *There is a Real Conflict of the Circuits.*—Perhaps because they have confused these two concepts, respondents fail to reconcile the two lines of cases in other courts of appeals that conflict with the judgment below. First, at least one court has—unlike the Eleventh Circuit—declined to expand the bankruptcy "mootness" doctrine beyond the statutory language of the Bankruptcy Code that establishes it. *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1084 (3d Cir. 1990). In the present case, of course, it is common ground that the statutory preclusion does not apply. Pet. 18-20. While respondents spend considerable energy distinguishing the *facts* of the *Joshua Slocum* case (Smith Br. 13-16; BNY Br. 16-17), the conflict presented by that case is the legal issue whether the statute may be applied where, by its express terms, it does not purport to preclude judicial scrutiny. The *Joshua Slocum* court expressly declined to extend the "mootness" doctrine beyond the limits of the statute's language. 922 F.2d at 1084. The Eleventh Circuit has done just that. *See* Pet 19.

Moreover, several courts of appeals have declined to apply the bankruptcy "mootness" concept to cases where all necessary parties are before the court and the court is able to fashion effective relief. *See* Pet. 22-24. Here, it is agreed that nothing prevents court-ordered disgorgement of the unlawfully taken credit—no third party will be adversely affected. It is remarkable that the Bank contends (BNY Br. 13) that it somehow has "changed its position" by having received a deed of the property on which it had a mortgage as a result of the centerpiece of the Plan of Reorganization that it proposed. It hardly is the case that deeding property to the first mortgagee on a property involves a change of position on the part of the recipient, though it surely did on the part of the debtors; one would think this was similar to the consequences of a strict foreclosure by a mortgagee (as con-

trasted with a foreclosure sale to a third party) outside of bankruptcy or reorganization proceedings.

The trustee completely ignores the conflict between the decisions of the D.C., Sixth and Ninth Circuits and the decision below. The Bank does not address it either, except to state that the Eleventh Circuit has cited some of the conflicting cases decided by the other circuits. But the Bank does not dispute that the Eleventh Circuit has here departed from the case-by-case approach of the other circuits and instead applied its own version of the "mootness" doctrine to flatly preclude any sort of judicial review following implementation of a reorganization plan—whether or not all necessary parties are before the court and whether or not effective relief can be granted without adversely affecting third parties.

4. *The Petitioners Have Been Deprived of Appellate Review of the Only Judgment Holding that the Bank was Not Undersecured.*—The Bank provides a lengthy description of the number of appeals that have been taken in this entire corporate reorganization and the length of the reorganization (more correctly, liquidation) proceedings, presumably to prevent the grant of certiorari by creating an impression of weariness and *deja vu*. BNY Br. 1-2, 10. But what cannot be concealed is the fact that at the time of the confirmation of the Plan, the confirming court found that the Bank was undersecured (Pet. App. 12a); that the Bank's counsel later represented that the Bank was undersecured (Pet. 9-10); and that the only judicial finding to the contrary is the decision by Bankruptcy Judge Weaver (Pet. App. 11a), made without any findings of fact whatsoever, that the Bank was not undersecured. It is this decision by Judge Weaver that petitioners attempted to obtain appellate review of in the district court and the court of appeals. The denial of appellate review to them by the district court and court of appeals is the subject of the present petition.

5. *The Respondents' Other Contentions are Without Merit.*—Finally, respondents make several arguments in

support of denying certiorari that seem rather to indicate that there are no solid bases to defend the judgment below. The trustee argues that the petition in this case is an impermissible "collateral attack on the confirmed plan." Smith Br. 16. Yet it was the *trustee* who brought this proceeding so that the issue of the Bank's credit for postpetition interest could be adjudicated.[4] And at the time he brought it, the Eleventh Circuit had already held that the debtors' appeal of the confirmation order was moot (because they did not post a multi-million dollar bond) and had adhered to that determination on rehearing. Pet. 11-12.

The trustee has a strange view of the judicial process: *he* is entitled to bring a declaratory judgment action to test the legality of the Bank's Plan years after the consummation of the Plan, but the defendants are not allowed to pursue the appellate process when a ruling adverse to them is entered in the court of first instance; indeed, according to the trustee, continued litigation of the issue that he himself raised is an impermissible "challenge" to the Plan (Smith Br. 16), consisting, he says, of the "shop-worn" argument that the "plan must comply with applicable statutory requirements." *Id.* at 19. Surely the trustee did not consider his declaratory judgment action seeking a resolution of whether the Plan complied with those very same "applicable statutory requirements" to be a challenge to the confirmation of the Plan or the sale of the property; instead he questioned whether the $27 million credit was lawful. Pet. 12. No

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[4] We note in passing that bringing and litigating the adversary complaints in this case, the tax case, and others is hardly consistent with the purportedly "ministerial" role that respondents (mistakenly) assert excuses the trustee from compliance with I.R.C. § 6012(b). Moreover, we question the propriety of the trustee's habit of taking positions in those litigations (and in the recent proceedings on the Trustee's Certificate, *see* p. 3 n.2, *supra*) that are seriously adverse to the debtors and the United States—who are, after all, beneficiaries of the Trust and supposedly to be protected by his status as a fiduciary. Perhaps the trustee's letter of indemnity from the Bank is showing.

Article III court had—or has—ever addressed that issue. But doing so will not require the unwinding of the Plan. Disgorgement by the Bank of the postpetition interest will not affect a single third party (except the United States, which will no longer face a substantial shortfall in the Trust).[5]

Respondents also make the curious argument that this Court's denial of certiorari from an earlier "mootness" decision somehow "precludes" the Court from considering this petition and acts as a binding adjudication on the merits under "principles of *res judicata*, collateral estoppel and the law of the case." BNY Br. 10-11 & n.12; Smith Br. 19. The decision of the court of appeals sought to be reviewed then had nothing to do with whether the Bank was undersecured or oversecured, and did not involve postpetition interest at all; it simply involved a pronouncement of the Eleventh Circuit of its notions of the "mootness" doctrine in another context. Moreover, respondents seem unaware that "this Court has rigorously insisted" that a denial of certiorari "carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J.). Contrary to respondents' contention, this Court's prior denial of certiorari does not "remotely imply approval or disapproval of what was said" by the court below. *Id.*[6]

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[5] While of course the trustee named the United States as a defendant in the tax case, he did not choose to name the United States as a defendant in the adversary proceeding from which the present petition arose. Thus the United States is not a party to the case here and has not made its views on it known to the Court, except to observe in its Reply in the tax case that the Bank and the trustee have raised the same "mootness" argument at issue here in their defense of the judgment below in the tax case. *See* p. 2, *supra*.

[6] Along these lines, the trustee makes an extended argument that "the doctrine of *res judicata* bars granting the writ" because the

Tellingly, *neither* respondent ever asserts that the Plan complies with the applicable statutory requirements. They argue, instead—as they did in opposing certiorari in the tax case—that it is now too late to do anything about the unlawful nature of the Bank's Plan because it has been implemented. Remarkably, the Bank states that this approach is needed by the "federal system" so that bankruptcy courts can quickly conclude reorganization proceedings. BNY Br. 16-17. In essence, the Bank seeks approval of a judicially created doctrine that effectively precludes Article III scrutiny of bankruptcy judges' decisions. Once a creditor's "cram down" plan is confirmed, unless the debtors post a bond, the entire case will be "moot" and Article III review improper. There is neither a need nor a rationale for such a rule. Indeed, if Congress

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Eleventh Circuit had earlier ruled that the debtors' appeal of the confirmation of the Plan was moot. Smith Br. 22-24. That assertion (which confuses the Court's authority to act with its judgment on the merits) is not only erroneous, it should not be considered at all. To begin, a finding that a case is moot cannot form the basis of claim (or even issue) preclusion because, by definition, such a finding prevents the entry of a "final judgment *on the merits*." *See Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (emphasis added). Instead, a finding of mootness "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950); *accord Deakins* v. *Monaghan*, 484 U.S. at 200-01. Here, the Eleventh Circuit did just that when it dismissed the debtors' appeal of the confirmation order as moot and vacated the judgment below. *Miami Center Ltd. Partnership* v. *Bank of New York*, 838 F.2d 1547, 1558 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). Moreover, the theory that any claim for relief by the *debtors* would be barred under principles of claim preclusion is irrelevant here: it was the *trustee* who brought this action and the debtors have made no counterclaims against him. The plaintiff, having won below, cannot invoke the doctrine of *res judicata* to preclude appellate or certiorari review of the judgment in his favor. Finally, this novel theory was not pressed in or considered by the court of appeals; absent exceptional circumstances (none of which are identified here), this Court should not consider it. *See United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362-63 n.16 (1958).

had done explicitly what respondents suggest the courts should do, such a statute would have raised the serious constitutional question whether the "essential attributes of judicial power" had been retained in an Article III court. *See Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 77 (1982) (plurality opinion).

This case presents an integral part of the scheme exposed in the tax case, Nos. 90-1361 and 90-1484. In light of the admissions made by the Bank in its brief in opposition in the tax case (and respondents' defense of the judgment below in that case by reliance on the same "mootness" doctrine at issue in this case), certiorari should be granted in this case to review the "mootness" issues presented by this case. Review would prevent the decision of this Court in the tax case, should it be in favor of our contentions, from being an unavailing one because of the Bank's actions in receiving and retaining the postpetition interest. To paraphrase Judge Learned Hand's words in *Ewen* v. *Peoria & E. Ry.*, 78 F. Supp. 312, 325 (S.D.N.Y. 1948), "The tail [ought to go] with the hide."

For the foregoing reasons, and for the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1991

# APPENDIX

# APPENDIX

**APPENDIX**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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Case No. 91-0953-CIV-RYSKAMP

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IN RE HOLYWELL CORPORATION, *et al.*,
*Debtors.*

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THE UNITED STATES OF AMERICA,
HOLYWELL CORPORATION, *et al.*,
*Appellants,*
v.
THE BANK OF NEW YORK and FRED STANTON SMITH,
*Appellees.*

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On Appeal From the United States Bankruptcy Court for the Southern District of Florida

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[Filed May 16, 1991]

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ORDER GRANTING STAY PENDING APPEAL

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RYSKAMP, *District Judge*:

THIS CAUSE is before the court on emergency motion of appellants United States, et al., for stay. After careful consideration of the record, and having held oral argument in this matter, the court now issues the following memorandum order.

## I. *Background*

The motion now before this court begins the latest in a long line of appeals arising out of a bankruptcy case that commenced nearly seven years ago. The appellants herein challenge the Bankruptcy Court's oral finding of April 25, 1991 and its written order of May 2, 1991, which determined that the liquidating trustee should execute and deliver to the Bank of New York ("the Bank") a trustee's certificate in the amount of $22,128,484.05. The present motion of the debtors and the United States seeks a stay of the Bankruptcy Court's decision pending resolution of the appeal to this court.

## II. *Analysis*

In *Garcia-Mir* v. *Meese*, 781 F.2d 1450 (11th Cir. 1986), the Eleventh Circuit articulated a four-factor test to be used in evaluating a motion for stay pending appeal. *Id.* at 1453. For the movant to prevail on such a motion, this test requires a showing:

> 1) that the movant is likely to prevail on the merits on appeal; 2) that absent a stay the movant will suffer irreparable damage; 3) that the adverse party will suffer no substantial harm from the issuance of the stay; and 4) that the public interest will be served by issuing the stay. *Jean* v. *Nelson*, 683 F.2d 1311, 1312 (11th Cir. 1982) (per curiam), *see also*, 11th Cir. R. 17(b)(1).
>
> Ordinarily the first factor is the most important. A finding that the movant demonstrates a probable likelihood of success on the merits on appeal requires that we determine that the trial court below was clearly erroneous. *In re Grand Jury Proceedings*, 689 F.2d 1351, 1352 (11th Cir. 1982) (per curiam). But the movant may also have his motion granted upon a lesser showing of a "substantial case on the merits" when "the balance of the equities [identified

> in factors 2, 3, and 4] weighs heavily in favor of granting the stay." *Ruiz* v. *Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (per curiam), *cert. denied*, 460 U.S. 1042, 103 S. Ct. 1438, 75 L. Ed. 2d 795 (1983). *Id.*

A. *Likelihood of Prevailing on the Merits*

The appellants make several arguments in support of their contention that they are likely to prevail on the merits of this appeal. First, they argue that the basis for the issuance of a trustee's certificate is a funding agreement incorporated in an amendment to the plan of reorganization (the "second amendment") that was not approved by the bankruptcy court after notice and hearing. The Bank responds, in somewhat conclusory fashion, that "[t]here were no material amendments."

Second, the appellants argue that a prior Eleventh Circuit opinion in this matter, *In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990), holding that the equitable subordination of claim 502 was unjustified was in effect a rejection of the Bank's argument that its obligation to pay that claim arose under the funding agreement. Therefore, appellants argue, the funding agreement is inapplicable, and may not serve as the basis for the issuance of a trustee's certificate. The Bank responds by noting that the Eleventh Circuit indicated a belief that a trustee's certificate had already been issued. *See In re Holywell Corp.*, *id.* at 877.

This court must conclude that there is a substantial likelihood that the appellants will prevail on the merits in this appeal. First, the fact that the second amendment was apparently never separately confirmed by the bankruptcy court after notice and hearing is a matter of serious concern. Second, the prior Eleventh Circuit opinion does suggest that the Bank is not entitled to a trustee's certificate, notwithstanding the erroneous dictum to the effect that a trustee's certificate had already been

issued. Finally, and most importantly at this juncture, the failure of the bankruptcy court to enter any findings of fact or to include any legal analysis in its May 2, 1991 order granting the Bank's motion for the issuance of a trustee's certificate makes it difficult for this court to presume that the issuance of the trustee's certificate is proper.

B. *Irreparable Damage*

The appellants argue that if the Supreme Court reverses the Eleventh Circuit decision that the trustee had no obligation to file federal income tax returns and pay federal taxes, there is a substantial likelihood, if the trustee's certificate is issued, that appellant United States will be unable to collect taxes due to the depletion of funds held by the trustee. Although the Bank correctly notes that the appellants' argument is based on the speculative contingency of the Supreme Court granting certiorari and reversing the Eleventh Circuit decision, the potential damage to the United States is severe and likely irreparable.

C. *Harm to the Adverse Party*

The bank argues that it "is prejudiced by every day of delay" in the conclusion of these cases. Although this may be true, the Bank itself must share responsibility with the other parties (and perhaps the courts) for the drawn-out nature of these proceedings. In any event, any harm caused by one further delay at this juncture is outweighed by the potential harm caused by denying a stay.

D. *The Public Interest*

Because the public interest in this matter appears to coincide with the interest of the United States (i.e., the collection of taxes), the public interest would be best served by granting the stay.

## III. CONCLUSION

Based upon the foregoing analysis, it is hereby:

ORDERED and ADJUDGED that appellants' motion for stay is GRANTED. The order of the bankruptcy court, filed May 2, 1991, requiring the issuance and delivery of a trustee's certificate in the amount of $22,128,484.05 is therefore STAYED.

DONE and ORDERED in chambers at the United States District Court, Miami, Florida this 15th day of May, 1991.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
United States District Judge